81-2250

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No. ____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

IVA MAY HARVEY, a widow, *et al.*,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. What body of law determines ownership of land which (a) when conveyed by federal patent in 1914 was in Arizona, (b) by 1930 was on the California bank of the Colorado River, the interstate boundary, but (c) remained under the jurisdiction of Arizona until 1966, when by an interstate boundary compact Arizona relinquished control and transferred jurisdiction over this parcel to California?

2. Assuming the court of appeals was correct in choosing Arizona law to determine ownership of this California land, did it misinterpret the law of Arizona?

3. Did the district judge err in refusing to give a jury instruction modeled after the then-controlling federal doctrine of accretion.

4. Under what circumstances may equitable defenses constitute a bar to the United States asserting title to lands which it claims are in the public domain and defendants claim were patented to their predecessors in interest?

LIST OF PARTIES

This petition is submitted on behalf of 162 individuals[1/] who have

---

1/ Their names are: Iva May Harvey; Donald C. Allred and Bonnie L. Allred; Barney Arntzen; Donna Arntzen; Gaylord H. Arntzen; Willis E. Baker and Georgia M. Baker; Oscar J. Beem; Kenneth C. Bouck and Dorothy B. Bouck; Donna J. Brookins; George H. Brookins; Ralph (Continued)

been ejected from approximately 27 acres

W. Brookins and Blanche V. Brookins; Robert R. Brookins and Barbara I. Brookins; Robert Dean Buckman; Wanda Lee Buckman; Clarence H. Buzbee and Helen L. Buzbee; Willard Dewey Calder; Charlie Campbell and Mary Campbell; James M. Carpenter and Helen M. Carpenter; W.J. Carpenter and Naomi R. Carpenter; Donald Carvalho and Mabel Carvalho; Myron F. Cox and Cecilia M. Cox; Evelyn H. Curry; James Henry Curry; Leo Denham and Janice Denham; William de Yong and Helen de Yong; Jack Diamond and Frances Diamond; Don Dinsmore; Paul J. Evans, Jr. and Ruth C. Evans; Ray Allen Farmer and Lucille D. Farmer; Charles W. Feemsteer and Edna C. Feemsteer; Wilmer E. Foster and La Rue Foster; Gerardine M. George; Emil Matthew Haag and Genevieve Haag; Joanne E. McLain; Alice F. Harvey; Davonne F. Harvey; Denzil P. Harvey; Donald G. Harvey and Alice J. Harvey; Harvey, Kindred E., the Estate of; Donald E. Hausmann and Florence H. Hausmann; Lloyd B. Henkel and Helen C. Henkel; Ruby M. Holcomb; Ellis Holcomb; Howell D. Holcomb and Pauline E. Holcomb; Harvey J. Howell and Beulah I. Howell; Stewart Hubbard and Bonnie Dee Hubbard; Lydia Hubbard; Thomas G.

(Continued)

of land. Petitioners are defendants to

Hubbard; Harry J. Jacobsen and Myrl Ann Jacobsen; Wallace M. Johnson and Julia A. Johnson; Eugene Kaintz and Sandy Kaintz; Leroy Kirkpatrick and Mary E. Kirkpatrick; Phillip E. Kirkpatrick and Josephine Kirkpatrick; Clarence L. Knight, Jr.; Lee Deane Products, Inc., a California corporation; Frank E. Lago and Ethel E. Lago; Donald C. Lurk and Lavern C. Lurk; Karl Richard Lust and Monte Jan Lust; Steve J. McCoy; Jerome P. McLaughlin and Joanne E. McLaughlin; Verle W. McLaughlin and Gwyneth McLaughlin; Penny Meredith; Isla Mills; Harry E. Moore and Wilma B. Moore; Lee Moore, Jr.; Billy J. Nall; Chester H. Nall and Laura V. Nall; Jennifer Nall; Ernest H. Nelson and Gladys A. Nelson; Doris Palmer; Charles P. Patriquin and Florence A. Patriquin; Cecile L. Patriquin; Robert Hall; Gerald E. Patterson and Judy D. Patterson; Anna L. Peters; Paul G. Peterson and Elisa E. Peterson; Anthony J. Polanis and Helen L. Polanis; Michael F. Rhoades; Mary Evelyn Rhodes; Peggy Rhodes; Virgil Rhodes; William Earl Rhodes; William P. Rhodes; Ami L. Richardson and Velma Richardson; Paul E. Richardson and Norma T. Richardson; J. Linn Rodgers; Ralph

(Continued)

this action brought by the United States of America.

R. Ross and Anna Mae Ross; Ronnie Ruhs and Ruth Ruhs; Paula Rose Schaller; Joseph L. Smith and Dorothy B. Smith; Emma N. Snelling; Donald F. Stafford and Frances S. Stafford; Virgil D. Stiller and Elizabeth A. Stiller; Parker E. Stoner; James S. Thomas and Hilma M. Thomas; James Trulove and Helen E. Trulove; Robert W. Trulove and Beverly J. Trulove; Joseph S. Ward; Robert S. Ward and Marie E. Ward; Dennis L. Warn; Buddy D. Wayman and Frances M. Wayman; Henry E. West and Carolyn K. West; Frank Whichter and Mary Whitcher; Resil C. Williams and Helen F. Williams; Gaylerd Wiltfang and Collette Wiltfang; Loretta Wiltfang; Robert R. Worley and Shirley Worley; Lester Wright and Jean L. Wright. Names joined by the conjunction "and" are persons sued as husband and wife.

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REPORTED DECISIONS BELOW

The opinion of the court of appeals is reported at 661 F.2d 767. The decisions of the district court are unreported.

JURISDICTION

The decision of the court of appeals was rendered on November 16, 1981. Petitioners timely sought rehearing; relief was denied by order entered March 10, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1976).

STATUTES INVOLVED

The case involves the following federal and state statutes:

(1) Real property quiet title actions

> (a) The United States may be named as a party defendant in a civil action under

> this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

28 U.S.C. § 2409a, Pub. L. No. 92-562, § 3(a), 86 Stat. 1176 (1972).

(2) PURPOSE

> The boundary between the States of Arizona and California on the Colorado River has become indefinite and uncertain because of meanderings in the main channel of the Colorado River with the result that a state of confusion exists as to the true and correct location of the boundary, and the enforcement and administration of the

> laws of the two states and of the United States have been rendered difficult.
>
> The purpose of this compact is to fix . . . the boundary line between Arizona and California on the Colorado River. . . .

Interstate Compact Defining the Boundary Between the States of Arizona and California, Pub. L. No. 89-531, art. I, 80 Stat. 340 (1966); 1963 Ariz. Sess. Laws, ch. 77 § 2; 1963 Cal. Stat. ch. 859 § 1 (codified at CAL. GOV'T CODE § 176 (Deering 1973).

(3) Preservation of Rights.

> Nothing contained in the provisions of this act, or any operation thereof, shall prejudice the titles, rights or claims of any person, public or private, natural or artificial, to any of the lands herein involved, whether such titles, rights or claims arise or exist upon the basis that the lands affected by the designation of boundary as set forth in the compact and in this act were

> previously a part of the State of Arizona and have now become a part of the State of California, or were previously a party of the State of California and have now become a party of the state of Arizona, or otherwise; and no person shall be prejudiced in the water rights which he now has by reason of anything contained in this act.

Ariz. Sess. Laws ch. 77 § 5 (set out as note to ARIZ. REV. STAT. ANN. § 41-522 (West 1974)); 1963 Cal. Stat., ch. 859 § 4 (set out as note to CAL. GOV'T CODE §§ 175 (Deering 1973)).

(4) Alluvion

> Where, from natural causes, land forms by imperceptible degrees on the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right of way over the bank.

CAL. CIV. CODE § 1014 (Deering 1971).

STATEMENT OF THE CASE

This litigation involves 27 acres of land subdivided into 96 lots known as "Harvey's Fishing Hole". The acreage is located in the Cibola Valley, on the California bank of the Colorado River, approximately 17 miles below Blythe, California.

This property is part of a larger area surveyed by the United States in 1902 and described by reference to the Gila and Salt River Meridian. In 1960, the area was resurveyed; as then the River lay to the south and not to the north of the parcel, it has since been described by reference to the San Bernadino Meridian.

By federal patent dated January 13, 1914, President Woodrow Wilson conveyed

this and other lands to Mr. Cherry S.E. Carlin. The parties stipulated to the direct unbroken chain of title from Mr. Carlin to Kindred and Iva May Harvey. The Harveys purchased the disputed acreage on November 10, 1952 from Richard F. and Lillian M. Goulette, who had had title quieted in them by the Arizona state courts.

The Cibola Valley is a broad alluvial floodplain through which the Colorado River has meandered for centuries. Until closure of Hoover Dam in 1935, the River was wild and unpredictable. Devastating floods and rapid channel changes were not uncommon. Although in 1914 these 27 acres lay south of the Colorado River, by 1935 the River's course had changed so that the

land then lay north of the river. The movement was substantially completed by 1930. The 1930 channel was approximately 1,000 feet south of that of 1924.

Between 1909 and 1930, many attempts were made to contain the River. In 1909 Laguna Dam, a federal reclamation project near Yuma, Arizona, was closed, causing an aggradation of the riverbed in this area. Later, a 31-mile long levee was constructed nearby. The local irrigation district operated dredges, fresnos and similar equipment in and near the River to maintain this levee, particularly in connection with the severe floods of 1921, 1922 and 1924.

Also, prior to 1930, many efforts were made to alter the River's course.

Field tripods connected by cables were placed in it so that when the River rose trees and other water-born debris would be trapped, block the channel and, with luck, force the River into a new channel. During the same period, at least seven man-made cuts were constructed near Harvey's Fishing Hole in order to straighten the River's channel and eliminate several miles of its length. These cuts caused an extreme increase in the velocity of the River and a corresponding increase in erosion of its silty banks. As explained by government witness Mr. John McKwen, the cuts also caused a resurgent tendency for the River to meander and extend its bends in this area. No significant River

movements have occurred in the area since 1930.

When the Harvey's purchased this parcel in 1952, it was completely overgrown. During 1956 and 1957 the property was cleared for the development of a residential and recreational community. The parties stipulated that "the clearing and preparation of said lands for development was done openly and was observable by representatives of the United States, including representatives of the U.S. Bureau of Reclamation." App. at 87a.

At this same time, the Harveys obtained permission from the State of Arizona to subdivide this parcel. The State of California authorized them to advertise the lots in that state.

In 1958 the Harveys began selling lots, eighty of which had been sold by the time of the trial. Homes, boat docks, cabanas and other permanent improvements were built. Sales of lots and construction began with the knowledge of officials of the United States.

In the late 1950's, the Bureau of Reclamation, Office of River Control, began to review whether certain lands along the Colorado River were formed by accretion. At this time that office's hydrologist, Mr. McEwan, formed his opinion that Harvey's Fishing Hole was formed by accretion. He promptly informed the Solicitor's Office of his findings. Thereafter, he continued to visit Harvey's Fishing Hole, to talk with its occupants, and to observe them

build homes and make other permanent improvements. He did not tell petitioners to stop construction or inform them that, in his opinion, the land was formed by accretion and that they were trespassing.

In October 1960, the United States commenced a condemnation suit to take for a public purpose a parcel immediately downstream from Harvey's Fishing Hole. That suit involved 11.8 acres of land owned by R.A. and J.F. Beaver. The Harvey's, adjoining landowners, were named and served. Assured by the Beaver brothers they need not participate, the Harveys initially did not do so.

On May 8, 1961, Kindred Harvey and his son Donald attended a meeting held to explain the Interior Department's new

lower Colorado River land use permit program. The meeting was chaired by Mr. Graham Hollister, Special Assistant to the Secretary. He announced the government's goal of owning a 200-foot strip on either side of the Colorado River and stated that some private land might have to be acquired to accomplish this goal. At the conclusion of this meeting, the Harvey's inquired of Mr. Hollister if the United States intended to condemn the subdivision. Mr. Hollister, who advised the Harvey's he had not heard of the subdivision, answered "no."

Later in 1961, the Lower Colorado River Land Use Office began interviewing occupants with riverfront land pursuant to the new permit program. A government employee participating in this process,

Mrs. Ferne Blair, testified that when it came time to interview the occupants of Harvey's Fishing Hole, the office decided to defer speaking with them pending the outcome of the condemnation case against the Beavers.

Between 1961 and 1967, the government employed a Surveillance Specialist at the Land Use Office. He observed the development of Harvey's Fishing Hole and several times reported the occupants' progress and improvements to his superiors. In all other situations involving Colorado riverfront land, the Surveillance Specialist posted signs on any improvements built on land, and ordered the occupants to cease construction and occupancy until they received a use permit from the government. No signs

were posted at and no warnings were given to the occupants of Harvey's Fishing Hole.

In January 1963, the Harveys met with Melvin Crosby, Assistant Administrator of the Lower Colorado River Land Use Office, to discuss the occupany of another parcel of riverfront land. In his letter requesting this meeting, Mr. Crosby indicated that there was a "a question as to the status of the area you occupy in Sportsmen's Paradise [Harvey's Fishing Hole] area, and discussion of this area must be deferred to a later date." Ex. 92. At this meeting, Mr. Crosby was shown copies of the 1914 patent and of the Harvey's chain of title. After examining these documents he stated: "you could find no better

title in the United States. . . ." RT 792.

Later in 1963, the Harvey's became concerned that the Beavers were not disposed to fully defend the condemnation case. Accordingly, they filed an answer. The government moved to strike contending, inter alia, that the Harvey's "claims of interest in and to land adjoining the property and premises condemned herein are totally irrelevant and immaterial to the issues of the instant action." Ex. N at 8. In response to this motion and pursuant to a stipulation, the Harvey's agreed to withdraw their answer without prejudice. Based upon the government's representation that the result of that case was irrelevant, the Harvey's believed that

the Beavers' case would not affect their title to Harvey's Fishing Hole and they continued to sell lots.

The United States later was not required to compensate the Beavers because the district court concluded that the 11.8 acres were formed by accretion. The Ninth Circuit affirmed. Beaver v. United States, 350 F.2d 4 (1965), cert. denied, 383 U.S. 937 (1966) (hereinafter Beaver).

In 1966, the interstate compact redefining the boundary between Arizona and California was enacted to forever settle the confusion about which state had jurisdiction over land located in the floodplain of the Colorado River. Before then, some land located on the Arizona side of the river was claimed by

California and some land on the California side was claimed by Arizona.

Prior to 1966, Harvey's Fishing Hole was claimed by Arizona. The residents of Harvey's Fishing Hole paid real property taxes to Yuma County, Arizona. Yuma County reimbursed Imperial County, California, for the education of the children of the community. Yuma County appointed a Deputy Sheriff to keep the peace. Arizona regulated the subdivision's waterworks and the restaurant and lounge located there. Since ratification of the interstate compact, California has exercised jurisdiction over Harvey's Fishing Hole.

In January 1967, Mr. Crosby, on official business, met with Kindred Harvey at the subdivision. After a

personal inspection he stated "this parcel could not be accretion land." RT 649.

In April and May of 1967, the Lower Colorado River Land Use Office sent letters to each of the occupants of Harvey's Fishing Hole advising them that "we are now accepting applications for temporary use of land from occupants of Harvey's Fishing Hole subdivison (a.k.a. Sportmen's Paradise) who have been occupying land of the United States on or before August 24, 1965." Ex. AE. None of the occupants of Harvey's Fishing Hole made application. On July 17, 1972 the United States commenced this action pursuant to 28 U.S.C. § 1345 (1976) to eject petitioners from their lots and recover rent.

REASONS THAT A WRIT OF CERTIORARI SHOULD ISSUE

There are many important reasons for granting certiorari here.

First, the decision below misapplies the principles enunciated in Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979) (hereinafter Wilson), and disregards the rulings of Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) (hereinafter Corvallis Sand), Nebraska v. Iowa, 406 U.S. 117 (1972), and Arkansas v. Tennessee, 246 U.S. 158 (1918). This long line of authority directs the application of California, not Arizona, law to resolve this dispute.

Second, the decision below contradicts two other relatively contemporaneous opinions of the same circuit

court which correctly apply the rulings of the aforementioned precedents. One of those decisions contradicts the selection of law made here and applies California law under similar circumstances. The other contradicts the substantive determination made here that the Arizona doctrine of accretion is different from that of California. The correct legal standard is one expressly mandated by the highest courts of both California and Arizona and previously acknowledged by this Court. Principles which determine questions of title to land must be consistent and definite, particularly where a boundary stream is involved.

Third, as this case involves construction of an interstate compact, this

Court's plenary review is especially warranted. Petitioners submit that the court of appeals' construction of this compact is contrary to its terms and is in discord with its purposes.

Fourth, this case raises several important questions of law which have not been, but should be, settled by this Court. These questions pertain to the assertion of equitable defenses against the United States in disputes over title to real property. Moreover, the equitable standards which were applied by the court below directly conflict with principles previously enunciated by this Court.

Fifth, the court of appeals' disregard of many applicable precedents is such a radical departure from the

accepted and usual course of judicial proceedings as to call for this Court's supervision. Also, the court of appeals' failure to exercise its equitable powers to correct the miscarriage of justice effected below (by inter alia, not voiding the award of back rent to the Government, see United States v. Harvey, 661 F.2d 767, 769, n.1 (9th Cir. 1981) (hereinafter Harvey)) is yet another reason that this Court should assume jurisdiction.

The foregoing considerations are discussed in two substantive sections. The first pertains to the choice of law issue. The second pertains to the petitioners' assertion of equitable defenses against the United States.

I. THIS COURT SHOULD RECTIFY THE APPLICATION OF IMPROPER LEGAL STANDARDS TO RESOLVE THE QUESTION OF TITLE TO THE PROPERTY.

At the time of trial, this Court had recently ruled that federal common law was to be applied in determining title to lands located along the Colorado River. Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973), reh. denied, 434 U.S. 1090 (1978) (hereinafter Bonelli). 2/ Significantly, it was held that under federal law "[t]he doctrine of accretion applies to changes in the river course due to artificial as well as natural causes." Id. at 327.

2/ Petitioners respectively submit that the short-lived doctrine promulgated by this Court in Bonelli is responsible for the length and complexity of this litigation.

As correctly noted by the Ninth Circuit, California law differs. "California Civil Code § 1014 recognizes a boundary shift only if it is precipitated by 'natural' as opposed to artificial accretion. The instruction advanced by the trial court made no reference to the cause of the accretion because it was modeled upon federal law." Harvey, 661 F.2d at 770. See State v. Superior Court (Fogerty), 29 Cal. 3d 240, 172 Cal. Rptr. 713, 625 P.2d 256, cert. denied, 50 U.S.L.W. 3248, reh. denied, 50 U.S.L.W. 3448 (1981); City of Long Beach v. Mansell, 3 Cal. 3d 462, 91 Cal. Rptr. 23, 476 P.2d 423 (1970); City of Los Angeles v. Anderson, 206 Cal. 662, 275 P. 789 (1929).

Shortly after trial, Bonelli was overturned by this Court's decision in Corvallis Sand, supra. That case involved land located in the channel of the Willamette River, a navigable stream. Speaking for the majority Justice Rehnquist stated:

> Under our federal system, property ownership is not governed by general federal law, but rather by the laws of the several states. 'The great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state.' [Citation omitted.] This is particularly true with respect to real property, for even when federal common law was in its heyday under the teachings of Swift v. Tyson, 16 Pet. 1 (1842), an exception was carved out for the local law of real property. [Citations omitted.]

> This principle applies to the banks and shores of waterways, and we have consistently so held. [Citations omitted.]

429 U.S. at 378-79.

On appeal, the Ninth Circuit agreed with petitioners that state law controlled. However, it determined that Arizona law and not California law was applicable. Further, it held that the district judge committed harmless error in instructing the jury under the federal standard because Arizona law is the same as federal law.

A. This Court's decision in Wilson, supra, does not compel application of Arizona law in this controversy.

The Ninth Circuit erroneously reasoned that "the principles established in Wilson are equally relevant here." Harvey, 661 F.2d at 771. It

then compounded the error by holding that the "preservation of rights" clause contained in Arizona and California statutes enacting the Interstate Boundary Compact, supra, requires application of Arizona law. Id. at 770-71.

Wilson simply does not apply. There, an exception to Corvallis Sand, supra, was created where the dispute is over land to which the United States "has never yielded title or terminated its interests. . . ." 442 U.S. at 670. In such cases federal law controls. Here, on the other hand, the government had parted with title to the land which it, as upland owner, now claims accreted to its land. Thus, Corvallis Sand, not Wilson, controls.

Application of California law here is in accord with a long line of Supreme Court precedent. E.g., Nebraska v. Iowa, supra; Arkansas v. Tennessee, supra. As explained by this Court in Arkansas v. Tennessee, and reiterated in Corvallis Sand and Nebraska v. Iowa:

> How the land that emerges on either side of an interstate boundary stream shall be disposed of as between public and private ownership is a matter to be determined according to the law of each state, under the familiar doctrine that it is for the states to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them. . . . But these dispositions are in each case limited by the interstate boundary, and cannot be permitted to press back the boundary line from where otherwise it should be located.

246 U.S. at 175-176 (emphasis added). The Ninth Circuit was not free to select the law of a jurisdiction other than California.

Even assuming Wilson applies here, the Ninth Circuit should have fashioned its rule of decision after California law. In Wilson, it was held that federal law "borrows" state law to resolve questions of ownership. There, Nebraska law was followed because the boundary compact between Nebraska and Iowa contained a provision requiring that:

> Title, mortgage, and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa and any pending suits or actions concerning said lands may be prosecuted to final judgment in Nebraska and such judgments shall be accorded full force in

> Iowa. Act of July 12, 1943, ch. 220, 57 Stat. 495.

442 U.S. at 678.

The "preservation of rights" clause enacted by California and Arizona is quite different. It simply provides, in pertinent part, that:

> Nothing contained in the provisions of this act . . . shall prejudice the titles, rights or claims of any person . . . to any lands herein involved . . . .

See 1963 Ariz. Sess. Laws, ch. 77, § 5; 1963 Cal. Stat., ch. 859, § 4. This provision only requires reference to Arizona law where use of California law would prejudice a litigant. Another recent Ninth Circuit decision, subsequently withdrawn for unrelated reasons, has so held. United States v. Aranson, No. 77-2295, slip op., (9th Cir. March

30, 1981, withdrawn April 17, 1981) (hereinafter Aranson) (App. at 121a). Any other construction would frustrate one of the express purposes of the Arizona-California Boundary Compact, which is to eliminate the confusion and difficulty in "the enforcement and administration of the laws of the two states and of the United States" caused by uncertainty over the location of the interstate boundary. Pub. L. No. 89-531, 80 Stat. 340 (1966).

The United States, as owner of land in California, cannot seriously contend it will be prejudiced by application of California law. Moreover, it could not have reasonably expected that title to accumulations to its California holdings

would be determined by Arizona law. See, e.g., Arkansas v. Tennessee, supra.

Another recent Ninth Circuit decision also is at odds with this case. United States v. Southern Pacific Transportation Co., 601 F.2d 1059 (1979), was a dispute over accretion to lands held by the government in trust for the Quechan Indians. Just as in this case, the upland was owned by the United States and was located in California; also the land found to have been eroded was in Arizona. Notwithstanding its reliance on Wilson, the court did not find, as it now does, that the "preservation of rights" clause compels application of Arizona law. Rather, the district court had correctly applied California law:

> Federal law borrows state law in determining title to avulsive or accretive lands affecting riparian land owned or possessed by the United States or by an Indian Tribe. (Wilson v. Omaha Indian Tribe, [citation omitted]). Under California law, the accreted land belongs to the Government, as owner of the riparian uplands. (Cal. Civ. Code § 1014 . . .).

United States v. Southern Pacific Transportation Co., 601 F.2d at 1066.

California, as the situs of the upland since statehood and of Harvey's Fishing Hole since 1966, and as domicile of the petitioners for several years prior to the commencement of this litigation, has vital interests in the outcome of this controversy (e.g., the welfare of its potentially homeless citizens, its ability to assess and collect property taxes). Arizona has no

such interest. See RESTATEMENT (SECOND) CONFLICT OF LAWS § 6 (1971).

Further, neither the government nor the petitioners had any reasonable expectation that Arizona law would be applied. By signing the Interstate Compact, Arizona relinquished any interest it had in this parcel. See Aranson, App. at 200a. No one contests California's jurisdiction over this small community. The Ninth Circuit committed reversible error in failing to apply CAL. CIV. CODE § 1014 (Deering 1971).

B. The circuit court's interpretation of Arizona law is contrary to the decisions of the Arizona Supreme Court.

The Ninth Circuit found that the district court committed harmless error in applying federal law since it found

Arizona law to be identical. Harvey, 661 F.2d at 771.

Three cases were relied upon in support of the conclusion that accretion, by Arizona definition, is simply "a 'gradual and imperceptible' movement." Id. Only one of those cases, State v. Bonelli Cattle Co., 107 Ariz. 465, 489 P.2d 699 (1971), aff'd on rehearing, 108 Ariz. 258, 495 P.2d 1312 (1972), rev'd, 414 U.S. 313 (1973), deals with the cause of the accretion, the critical inquiry here. The other two cases (State v. Jacob, 93 Ariz. 336, 380 P.2d 998, 1000 (1963), and State v. Gunther & Shirley Co., 5 Ariz. App. 77, 423 P.2d 352, 356-57 (1967)), pre-date Bonelli and, like most accretion cases,

do not involve any artificial or man-made changes to a river's channel.

In Bonelli the Arizona Supreme Court had held that the state owned the disputed parcel. It reasoned that:

> Where a river shifts to a new location as a result of unnatural forces, the state does not lose title to the bed of the stream in the old location. People ex rel. Dept. of Public Works v. Shasta Pipe & Supply Co., 264 Cal. App. 520, [sic] 70 Cal. Rptr. 618. . . .

Id., 107 Ariz. at 469, 489 P.2d at 703. The Ninth Circuit acknowledged this passage from the Arizona Supreme Court's decision but attempted to distinguish it by simply saying: "Bonelli did not involve an upland private claimant." 3/

3/ This, of course, is not correct. The upland owner in that case was Bonelli Cattle Co. and not the State of Arizona, which owned the

(Continued)

Harvey, 661 F.2d at 772, n. 7. But no distinction between public and private claimants was created by the Arizona Supreme Court. And such a limitation is illogical and inconsistent with the Arizona court's later decision in Bonelli. There it was held that the:

> artificial control of the river could not deprive Arizona of property rights in the bed which were constitutionally vested prior to completion of the Hoover Dam in 1938 and the later rechannelization by dredging. The condition of the Colorado River at or immediately prior to its control by artificial works is the appropriate time for determining the rights of the parties. . . .

108 Ariz. at 260, 495 P.2d at 1314 (emphasis added).

---

bed of the stream. See Bonelli, supra.

It is unlikely that the Arizona Supreme Court intended to confine this doctrine to the State, or that it would permit the "constitutionally vested" rights of others to be defeated by subsequent artificial control and rechannelization of the same river.

Moreover, it is noteworthy that the Arizona court relied on a California case in deciding that title to river-front property is not affected by "unnatural forces." Bonelli, 107 Ariz. at 469, 489 P.2d at 703. In the California case it was held that where the channel of a navigable stream was altered by mining and dredging operations, the State retained title to the old riverbed and did not acquire ownership of the bed of the new channel.

People ex rel. Dept. of Public Works v. Shasta Pipe & Supply Co., 264 Cal. App. 2d 520, 535, 70 Cal. Rptr. 618 (1968).

Finally, this Court has recognized that under Arizona law, artificial accretion does not affect ownership. 4/ Discussing the state court decision in Bonelli, this Court stated:

> The Arizona Supreme Court held that because the rechanneling of the Colorado River was an 'engineering relocation of the waters of the river by artifi-

---

4/ The Ninth Circuit also recently reached a similar conclusion in another Colorado River accretion case. "Although Arizona case law relevant to this issue is scant, the leading case, State v. Bonelli Cattle Co., [citation omitted] cites the California law on artificial accretion with approval. Because our resolution of the relevant issue employs the same law, it is unlikely that application of Arizona law would alter our result." Aranson, App. at 151a.

> cial means,' it was, under state law, an avulsion and did not divest the State of title. . . .

414 U.S. at 328. Indeed, this interpretation of Arizona law must be adhered to for, under principles previously laid down by this Court, if Arizona and California law of accretion differ, then California law must be applied if the River moved by accretion, and Arizona law must be applied if the River moved by avulsion. Arkansas v. Tennessee, supra, and Nebraska v. Iowa, supra. Such vagaries cannot be tolerated where title to real estate is concerned and are particularly disturbing where interstate boundaries are involved.

Thus, even if Arizona law applies, this Court should remand this case for a

new trial. 5/

C. The district court did not instruct the jury in accordance with full federal law.

When this case was tried, this Court's decision in Bonelli controlled. Bonelli contained the following analysis of the federal doctrines of accretion and avulsion:

> [F]ederal law must be applied with a view toward the limited nature of the sovereign's rights in the riverbed, and an

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5/ Petitioners should be allowed an opportunity to develop the impact of the man-made alterations to the River's course and to allow the jury to be instructed on the relevance of causation. In concluding that there is no need to further develop evidence of artificial accretion, the Ninth Circuit erroneously assumes petitioners contended below that the United States caused the accretions. 661 F.2d at 772, n.7. This is not so. See pp. 7 to 8, supra.

> analysis of the interests of the State and Bonelli, in light of the rationale for the federal common-law doctrines of accretion and avulsion, compels the conclusion that, as between the state, as owner of the riverbed, and Bonelli, as riparian owner, the surfacing of the subject land should be treated as accretion. . . .
>
> The rationale for the application of the doctrine of avulsion is not applicable to this dispute because of the limited interests of the State in the subject property. . . . The State's acquisition of the exposed land here could only be a windfall, since unnecessary to the State's purpose in holding title to the beds of the navigable streams within its borders. Accordingly, the narrowing of the river and vesting of title to the surfaced land in riparian owners does not detract from the State's legitimate interest in title to the riverbed, so as to require mitigation of the accretion principle by application of the doctrine of avulsion.

Id., 414 U.S. 328-29.

Bonelli also contains the following observations:

> Finally, recognition of the State's claim to the subject land would raise a serious constitutional issue as to whether the State's assertion of title is a taking without compensation, a question which we find unnecessary to decide on our view of the case. . . .
>
> * * *
>
> But there is no claim here by the State that depriving Bonelli of the subject land is necessary to any navigational or related purpose. [Citations omitted.] Moreover, what is involved in this case is not just a diminution or elimination of riparian rights, but the State's attempt to completely divest all of Bonelli's title and interest in the subject land.

Id. at 331-32. Petitioners submitted a proposed jury instruction (Requested Jury Instruction No. 15) modeled after these portions of the Bonelli opinion

which require a balancing of the interests of the respective land claimants in applying the federal common law of accretion. The district court refused to give this instruction, a reversible error. The Ninth Circuit did not address this issue.

Defendants' Proposed Jury Instruction N: 15 stated:

> In deciding whether the Colorado River moved by the process of accretion or avulsion, you should consider the respective interests of the parties in the land and whether a finding of accretion will result in a windfall to the U.S. government or a taking of the land from the defendants without compensation. Unless you find the land is necessary for navigational or some related purpose, you should not divest defendants of their title to "Harvey's Fishing Hole" by applying the doctrine of accretion. That is, you should consider the fairness of the end

> result before you make a finding of accretion or avulsion.

Obviously, under Corvallis Sand, state law now applies and Bonelli's analysis of the federal doctrines of accretion and avulsion need not be the ratio decidendi of this case. But Bonelli was the law when this case was tried and the district court did not properly instruct the jury. And when asked for a new trial under state law because of Bonelli's reversal, the district court refused, stating that California law was no different than federal law! RT 1051.

Fundamental fairness demands that petitioners be allowed to try this case either under state law, or under the full federal doctrine of accretion, as

articulated by this Court in Bonelli. So far they have been allowed to do neither.

II. THE CONSIDERATIONS SUPPORTING AN EQUITABLE BAR TO AN EJECTMENT ACTION BY THE UNITED STATES, CONSTITUTE AN IMPORTANT QUESTION WHICH HAS NOT BEEN, AND SHOULD BE, ADDRESSED BY THIS COURT, PARTICULARLY WHERE THE PERTINENT LEGAL PRINCIPLES EVOLVING IN THE CIRCUIT COURTS ARE CONTRARY TO CONGRESSIONAL POLICY AND SOUND PRINCIPLES OF EQUITY, AND WHERE THE UNGUIDED DECISION OF THE COURT OF APPEALS RESULTS IN MANIFEST INJUSTICE TO INNOCENT PARTIES.

As recently noted, this Court has not clearly defined the circumstances under which the United States might be estopped by the conduct of its agents. Schweiker v. Hansen, 450 U.S. 785, (per curiam), reh. denied, ___ U.S. ___, 101 S. Ct. 3023 (1981). Indeed the question of when "[t]he Government may be equita-

bly estopped . . . has been the subject of considerable ferment." Id. at 785 (Marshall, Brennan JJ. dissenting). Plenary consideration is overdue and sorely needed to provide adequate guidance to the lower courts. Id. at 792.

That the Supreme Court "will know an estoppel when [it] see[s] one provides" scant guidance for evaluating if the government should be estopped. Id. Indeed, this Court's history of virtual abstention from this area appears to be contributing to the development of a rigid, talismanic approach to estoppel and that doctrine is "being stripped of its equitable underpinnings." United States v. Ruby, 588 F.2d 697 (9th Cir. 1978) (Ely, J. dissenting), cert.

denied, 442 U.S. 917 (1979). Over the past decade, appellate analysis of estoppel claims has transformed from the judicious approach of "the estoppel doctrine is applicable to the United States where justice and fair play require it", [6] to an incantation that five specific elements must be satisfied, [7] and now to a formula embracing the further criterion that "an additional balancing test" is necessary

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6/ United States v. Lazy FC Ranch, 481 F.2d 985 (9th Cir. 1973); United States v. Lucienne D'Hotelle de Benitez Rexach, 558 F.2d 37 (1st Cir. 1977) (estoppel granted where it would be unconscionable to allow the United States to reverse an earlier position); cf. Michigan Wisconsin Pipeline v. Williams-McWilliams, 551 F.2d 945 (5th Cir. 1977).

7/ E.g., Oki v. INS, 598 F.2d 1160, 1162 (9th Cir. 1979).

where "the United States [acting as] trustee of public lands" is concerned. Harvey, 661 F.2d at 773.

This transformation of an equitable doctrine to a hard and fast legal standard is contrary to decisions of this Court in cases such as United States v. Moser, 341 U.S. 41 (1951), and United States v. Winona & St. Peter Railroad Co., 165 U.S. 463, 475 (1897) ("[s]urely after such a lapse of time, and after so many transactions in and with respect to these lands, the appellees are justified in saying that they have large claims upon the equitable consideration of the courts"). The broad equitable powers of courts should not be subverted by rigid adherence to frozen criteria which are

not required by either the Constitution or traditional notions of fairness.

In the case at bar, the court of appeals separately reviewed seriatim "several instances of alleged government misconduct," but completely disregarded the fact that an estoppel can be worked by a course of conduct persisting over a period of time. E.g., Semaan v. Mumford, 118 U.S. App. D.C. 282, 335 F.2d 704 (1964); United States v. Fox Lake State Bank, 366 F.2d 962 (7th Cir. 1966) (noted in Schweiker v. Hansen, supra, at n. 4).

Furthermore, no special, extra balancing test nor generally restrictive approach has ever been required by this Court in land title disputes between citizens and the United States. Indeed,

just the contrary is evidenced by this Court's decisions, and the imposition of such a requirement is contrary to congressional policy discernable in many federal statutes.

For example, 43 U.S.C. § 1166 (1976) imposes a 6-year statute of limitations to actions by the United States to challenge the validity of a land patent. In an early case construing this statute of limitations, this Court would not allow the United States to belatedly challenge a patent issued as a result of a mistake. Rather, it found that:

> Congress evidently recognized the fact that notwithstanding any error in certification or patent there might be rights which equitably deserved protection, and it would not be fitting for the government to insist upon the

> letter of the law in disregard of such equitable rights. In the first place, it has distinctly recognized the fact that when there are no adverse individual rights, and only claims of the Government and of the present holder of the title to be considered, it is fitting that a time should come when no mere errors or irregularities on the part of the officers of the land department should be open for consideration. In other words, it has recognized that, as against itself in respect to these land transactions, it is right that there should be a statute of limitations. . . .

United States v. Winona, 165 U.S. at 475-476. 9/

9/ Among the equities favoring the private litigants, were that the railroad had given value for the land received, that no individual was wronged by allowing the certification to stand, and that no fraud or wrong was imputable to the railroad. The Court went on to state: "Many years have passed since the certification, and since the company, in reliance upon the

(Continued)

The Supreme Court further elaborated upon congressional policy evidenced by 43 U.S.C. § 1166 in United States v. Chandler-Dunbar Water Power Co., 209 U.S. 447 (1908):

> The patent had been issued in 1883 by the President in due form and in the regular way. Whether or not he had authority to make it, the United States had power to make it or to validate it when made, since the interest of the United States was the only one concerned. We can see no reason for doubting that the statute, which is the voice of

---

> title it believed it had acquired, has disposed of the lands, and other parties have become interested in and have dealt with the lands as private property. Contracts have been entered into, suits maintained . . . and decrees and judgments entered and rendered in full reliance upon the title supposed to have been conveyed." Id. at 475. The relevance of these equities to this case is manifest.

> the United States, had that effect.... If the Act were confined to valid patents it would be almost or quite without use.

Id. at 450 (citation omitted; emphasis added).

Congress has subsequently spoken several times in this area of allowing public lands to conclusively pass into private ownership. The Color of Title Act, 43 U.S.C. § 1068 (1976), authorizes administrative actions to acquire title to public land by adverse possession. 43 U.S.C. § 772 (1976) forbids any resurvey of public lands to jeopardize rights accrued pursuant to a previous survey. More recently, Congress enacted 28 U.S.C. § 2409a (1972), to allow quiet

title actions to be maintained against the United States. 10/

In this case, the court of appeals remarked that the "property clause", U.S. CONST. art. IV, § 3, cl. 2, is "directly implicated when equitable estoppel is sought to be applied against a federal claim to title in land" and determined that "when Congress has not authorized a disposition of federal lands, the application of a remedy such as equitable estoppel against the federal claim or defense tends to frus-

---

10/ Additionally, in 1970, Congress enacted a public law which allowed similarly situated landowners a short distance upriver from these petitioners the opportunity to prove the merits of their claims to have title to certain accretion lands quieted in them. See Pub. L. No. 91-505, 84 Stat. 1106 (1970).

trate the intent of a specific constitutional provision." Harvey, 661 F.2d at 773, n.8. This is in manifest disregard for congressional policy, particularly as evidenced by 43 U.S.C. § 1068(a) and 28 U.S.C. § 2409a (1972).

That public lands which have been held as private property do not require any especially restrictive protection also is supported by sound judicial precedent. In United States v. Diamond Coal & Coke Co., 255 U.S. 323 (1921), this Court held that the United States could be precluded by laches from challenging even a patent procured through fraud, if the evidence showed that the United States was or should have been put upon inquiry by the facts of which it had knowledge.

Similarly instructive is United States v. Wharton, 514 F.2d 406 (9th Cir. 1975). There, the court found the United States was estopped from retaining title to certain lands. In addition to finding the elements of estoppel outlined in United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970), were satisfied, the court noted it was equally clear that the "fundamental fairness" standard of United States v. Lazy FC Ranch, supra, was met. The court explained:

> Governmental conduct would work a serious injustice if this family were divested of the home in which they have invested so much of themselves.
>
> The interest of the public would not be unduly threatened or damaged by invoking estoppel against the government and granting the occupants an opportunity to

> obtain this small tract of desert land. The public will be damaged to no greater extent now than it would have been had the original entry been completed. To the contrary, the public interest will be served by the addition of the land to the tax rolls once the Whartons have gained title. And, perhaps more importantly, the public has an interest in seeing its government deal carefully, honestly and fairly with its citizens.

United States v. Wharton, 514 F.2d at 412-413.

In this case, the court disregarded decisions such as these. Instead, it employed a piecemeal and myopic analysis which failed to weigh considerations such as laches on the part of the United States, notwithstanding the fact that the Government failed to make a claim to the land for over forty years after it was allegedly formed and for over twenty

years after the Harvey's began clearing it with the knowledge of government officials.

In its serial review of several of the many instances of government misconduct briefed by appellants, the court of appeals held that Mr. Crosby's statement that the Harvey's "title was good" was irrelevant to whether the government was asserting title to the subject land. Similarly, it concluded that whether or not the government planned to condemn Harvey's Fishing Hole was irrelevant to whether the United States planned to assert title. These conclusions can only be described as incredible.

The Harvey's are laypersons. They sought information from the officials charged with responsibility for admin-

istering these lands and were told the government had no plans to condemn them and that their title was good. Indeed, Mr. Crosby testified that action on the Surveillance Specialist's reports which noted improvements and changes in ownership at Harvey's Fishing Hole was intentionally held in abeyance pending resolution of the Beaver case. RT 616, 636. Also, Mrs. Blair testified that Harvey's Fishing Hole was intentionally skipped over in the land use application and permit procedures adopted by the Land Use Office and that notification of the United States' claim was intentionally postponed until after resolution of the Beaver case. RT 572-573. Obviously, the court's holding that appellants have not alleged facts establishing an active

or intentional concealment is plainly incorrect. 11/

Similarly, footnote 12 of the court's opinion demonstrates a misapprehension of law and fact. Record owners

---

11/ The court of appeals specifically found that the government's conduct with respect to the Beaver case does not support an estoppel because the dismissal was without prejudice and "consequently . . . 'did not cause [appellants] to take action or fail to take action that [appellants] could not correct at any time.' Schweiker v. Hansen", supra. Quite to the contrary, petitioners were severely prejudiced by the government's successful efforts opposing their participation in the Beaver case. Several key witnesses died in the interim and the Harvey's continued to sell lots believing that the issues of Beaver were irrelevant and immaterial to their concerns and did not affect them. Petitioners were further prejudiced by government counsel's references to the jury in this case about the Beaver holding that the adjoining lands were accretion lands (RT 86, 807-808).

of lands potentially affected by a government claim are entitled to more than constructive notice of the claim. Schroeder v. City of New York, 371 U.S. 208 (1962). Also, the 1960 resurvey merely changed the legal description applicable to these acres and could not jeopardize petitioners' title. See 43 U.S.C. § 772 (1976); cf. RT 206-208.

Application of a full panoply of equitable considerations in this case will be consistent with "the duty of all courts to observe the conditions defined by Congress [as to a matter within its exclusive domain]." Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 385 (1947). It also will avoid an egregious contravention of notions of "elementary fairness", United States v.

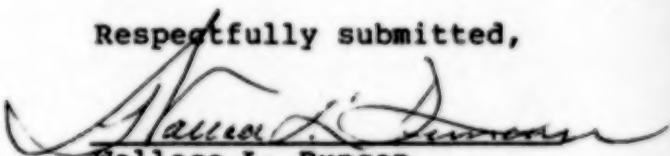
Moser, 341 U.S. at 47, which has been sanctioned by the appellate court.

In sum, for this Court to assume a supervisory role would be most appropriate here. The misguided analysis below has caused a miscarriage of justice. The decision of the court of appeals contravenes congressional policy with respect to claims against public lands and denigrates the appropriate equitable considerations to ensure that justice is achieved. It embraces a rigid test for applying estoppel, which test is a further retrenchment of an important and rapidly developing area which this Court has hitherto declined to affirmatively assist in shaping.

CONCLUSION

For all the reasons stated above, petitioners respectfully request that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,



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June 7, 1982

CERTIFICATE OF SERVICE

I, Carol MacKinnon, an attorney for petitioners and a member of the Bar of this Court, certify that on this 7th day of June, 1982, the foregoing Petition for Certiorari and Appendix thereto, consisting of two volumes, was served upon respondents by mailing three copies thereof to each of the following:

Solicitor General
Department of Justice
Washington, D.C. 20530

Ronald L. Styn, Esquire
Marinos & Styn
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I further certify that all parties required to be served have been served.

Carol MacKinnon
CAROL MACKINNON

81-2250

No. ____

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

IVA MAY HARVEY, a widow, et al.,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

**Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit**

APPENDIX TO PETITION TO WRIT

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UNITED STATES v. HARVEY

United States of America,

Plaintiff-Appellee,

v.

Iva May Harvey, a widow, et al.,

Defendants-Appellants.

No. 77-2279.

United States Court of Appeals,

Ninth Circuit

Argued and Submitted Nov. 6, 1980.

Decided Nov. 16, 1981.

The United States brought action seeking ejectment and seeking rental value damages for use of property. The United States District Court for the Southern District of California, Howard B. Turrentine, J., entered judgment on

jury verdict, and defendants appealed. The Court of Appeals, Tang, Circuit judge, held that: (1) district court was obligated to apply Arizona law in formulating accretion jury instruction, even though change in course of river resulted in parcel being located in California; (2) no reversible error occurred in giving accretion instruction based upon federal common law rather than Arizona law where instruction modeled on Arizona law would have contained same language defining accretion as "gradual and imperceptible" movement as was given; (3) evidence that parcel of land was created through accretion rather than by avulsion, which would not have divested defendants of

title, was sufficient to support jury verdict in favor of United States; (4) affirmative misconduct was necessary element of equitable estoppel asserted against United States; and (5) substantial evidence supported findings by jury that defendants were not ignorant of facts allegedly giving rise to equitable estoppel of claim asserted by United States, that defendants did not rely on alleged affirmative misconduct, and that no actionable affirmative misconduct by the United States occurred, thus precluding successful assertion of equitable estoppel against the United States.

Affirmed.

1. States -- 6

District court was obligated to apply Arizona law in formulating accretion jury instruction in ejectment action brought by United States, even though change in course of river resulted in parcel being located in California, where Arizona and California had entered into boundary pact covering land in issue, and such pact included "preservation of rights" provision requiring that an acquiring state respect title in any ceded land if such title was valid in ceding state. A.R.S. § 41-522 note; West's Ann. Gov. Code § 175 note.

2. Federal Court -- 908

In action United States brought

seeking ejectment and seeking rental value damages for use of property, no reversible error occurred in giving accretion instruction based upon federal common law rather than Arizona law where instruction modeled on Arizona law would have contained same language defining accretion as "gradual and imperceptible" movement as was given.

3. Navigable Waters -- 44(1)

In action United States brought seeking ejectment and seeking rental value damages for use of property, evidence that parcel of land was created through accretion rather than by avulsion, which would not have divested defendants of title, was sufficient to

support jury verdict in favor of United States.

4. Estoppel -- 62.2(4)

Litigants seeking to preclude Government interest in land had to prove more than technical elements of equitable estoppel in order to successfully assert it against the United States; in addition, litigants had to establish equities that, on balance, outweighed inherent equitable considerations which Government asserts as constitutional trustee on behalf of all people. U.S.C.A. Const. Art. 4, § 3, cl. 2.

5. Estoppel -- 62.2(4)

Affirmative misconduct was necessary element of equitable estoppel

asserted against United States in action it brought seeking ejectment and rental value damages for use of property. U.S.C.A. Const. Art. 4, § 3, cl. 2.

6. Estoppel -- 62.2(4)

Elements of equitable estoppel that must be proved when estoppel is asserted against United States to preclude its interest in land are: whether United States knew facts; whether United States intended or could justifiably be perceived as intending its conduct to induce reliance; whether party asserting estoppel was ignorant of facts; whether party asserting estoppel relied upon United States' conduct; and whether United States engaged in affirmative

misconduct. U.S.C.A. Const. Art. 4, § 3, cl. 2.

7. Estoppel -- 118

In action United States brought seeking ejectment and seeking rental value damages for use of property, substantial evidence supported findings by jury that defendants were not ignorant of facts allegedly giving rise to equitable estoppel of claim asserted by United States, that defendants did not rely on alleged affirmative misconduct, and that no actionable affirmative misconduct by the United States occurred, thus precluding successful assertion of equitable estoppel against the United States. 28 U.S.C.A. § 2409a.

8. Estoppel -- 62.1

Mere negligence on part of Government will not suffice to establish equitable estoppel.

Appeal from the United States District Court for the Southern District of California.

Before KENNEDY and TANG, Circuit Judges and LARSON*, District Judge.

TANG, Circuit Judge:

This is an appeal by 162 individuals from a judgment ejecting them from approximtely 27 acres of real property, Harvey's Fishing Hole, and awarding the government rental value damages for use and occupancy of this property since 1960.[1] Three issues are

before us: 1) whether state rather than federal law should have been applied in the jury instruction on the question of accretion; 2) whether substantial evidence supported the jury verdict that Harvey's Fishing Hole was formed by accretion rather than avulsion; 3) whether the United States was estopped from asserting its claim to Harvey's Fishing Hole. We affirm the judgment below on all three issues.

I.

This is a dispute between the United States and appellants over title to 27 acres of real property located along the Colorado River in Imperial County, California. The controversy over Harvey's Fishing Hole stems from

the southerly shift of the Colorado River channel. In 1914, the United States conveyed the parcel now known as Harvey's Fishing Hole by patent deed to Cherry Carlin. Title can be traced from Carlin to Kindred and Iva May Harvey. According to the 1914 deed, the land lay south of the Colorado River in Yuma, Arizona. Between 1914 and 1935, however, the Colorado River moved in a southerly direction, passing through Harvey's Fishing Hole until it established a channel in its present location. In other words, although the property now known as Harvey's Fishing Hole lay south of the Colorado River in 1914, by 1935 it was located north of the river. The Harvey's purchased the

land in question in 1952. Harvey's deed, like Carlin's, described the property as located in Yuma, Arizona. In 1952, however, the property in fact lay north of the river.

Between 1956 and 1958, the Harvey's cleared the property in preparation for development, obtained a sub-division permit and sold lots to third parties. By the time of trial, approximately 80 of the 96 lots had been sold to the other appellants.

In 1960, the United States resurveyed the property. The land was in the same geographical and physical location as that described in the 1914 patent. In 1960, however, it was described as located in California

rather than Arizona. In 1967, the government notified the occupants of Harvey's Fishing Hole that it claimed title to the land, and in 1972, filed a suit for ejectment and damages.

There were three major issues presented below. The first involves the propriety of the lower court's jury instructions. The government argued that the river moved by the process of erosion and accretion. It contended that, as the river migrated southward, it eroded the land on the southern bank (what is now Harvey's Fishing Hole), and deposited alluvion on the northern bank in the process. Although the jury verdict supported the government's position, appellants moved for judgment

nothwithstanding verdict and for a new trial claiming that the district court erred in defining accretion in its jury instruction. Appellants appeal the denial of these motions. The second issue centers on the jury verdict of accretion. Appellants argue that Harvey's Fishing Hole was not formed by accretion. They contend that the river moved southward by avulsion, a process through which the river violently or rapidly leaves its original channel. Were this the case, owners of the land originally situated south of the river, the appellants, would not have been divested of title. The third issue is whether the government was estopped from ejecting the appellants from Harvey's

Fishing Hole. The jury returned a verdict in favor of the government.

II.

As was then required by the Supreme Court's decision in Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 94 S. Ct. 517, 38 L.Ed.2d 526 (1973), the trial court fashioned its jury instruction on federal common law definitions of accretion and avulsion. Two days before the court had ruled on Harvey's motions for judgment notwithstanding verdict and for new trial, however, the Supreme Court in Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363, 97 S. Ct. 582, 50 L.Ed.2d 550 (1977), overturned Bonelli and held that, absent an independent basis for

the invocation of federal common law, state law controlled riparian ownership questions. Id. at 376-78, 97 S. Ct. at 589-90. Appellants moved for reconsideration of judgment shortly after the court entered judgment, arguing that, under Corvallis Sand, California law should have controlled the formulation of the jury instruction. The trial court denied the requested relief and appellants have renewed this claim on appeal.

According to appellants, an instruction based on California law would have resulted in a jury verdict against the government because California law differs from federal common law on the question of

accretion. California Civil Code § 1014 recognizes a boundary shift only if it is precipitated by "natural"[2] as opposed to artificial accretion. The instruction advanced by the trial court made no reference to the cause of the accretion because it was modeled upon federal law. Appellants claim that, because at least some of the accretion must be attributed to non-natural causes, an instruction fashioned under California's accretion definition was required.

Our review of the law, however, convinces us that the court should have applied Arizona rather than California law. Because Arizona law parallels the federal common law rule employed by the

court below, we affirm the judgment.

In Wilson v. Omaha Indian Tribe, 442 U.S. 653, 99 S. Ct. 2529, 61 L.Ed.2d 153 (1979), the United States, as trustee for the Omaha Tribe, sued several individuals over land that had originally been on the Nebraska side of the Missouri River, as part of the Tribe's reservation. Because the river gradually shifted, this land eventually became situated in Iowa. In resolving a choice of law issue on the accretion question, the Court distinguished its earlier decision in Corvallis Sand and found that federal common law, not state law, controlled the determination of the applicable law:

[T]he general rule recognized by

Corvallis does not oust federal law in this case. Here we are not dealing with land titles merely derived from a federal grant, but with land with respect to which the United States has never yielded title or terminated its interest....

In these circumstances, where the Government has never parted with title and its interest in the property continues, the Indian right to the property depends on federal law ... [T]his is not a case where the United States has patented or otherwise granted lands to private owners in a manner that terminates its interest and subjects the grantee's incidents of ownership to

determination by the applicable state law.

Wilson, 442 U.S. at 670-71, 99 S. Ct. at 2539.

Although the Court found federal common law controlling, it refused to promulgate a general federal common law rule of accretion and avulsion. Instead, the Court held that it would borrow state law in fashioning the federal rule of decision. Wilson, 442 U.S. at 671-76, 99 S. Ct. at 2540-42. In Wilson, application of Nebraska law was mandated because an interstate compact between Nebraska and Iowa required each state to respect titles, mortgages, and other liens that originally arose under the laws of the

ceding state. Wilson, 442 U.S. at 678, 99 S. Ct. at 2542. See United States v. Southern Pacific Transportation, 601 F.2d 1059, 1066 (9th Cir. 1979). Consequently, even though the disputed land was ultimately situated in Iowa, the Court held that Nebraska law applied.

[1, 2] Because Arizona and California have entered into a boundary pact covering the land in issue the principles established in Wilson are equally relevant here. Although the Arizona-California Boundary Pact dictates no choice as to what law shall govern disputes over land,[3] in ratifying the pact, each state adopted a

"preservation of rights" provision that declared:

> Nothing contained in the provisions of this act .. shall prejudice the titles, rights or claims of any person, public or private, natural or artificial, to any of the lands herein involved whether such titles, rights, or claims arise or exist upon the basis that the lands affected by the designation of boundary as set forth in the compact and in this act were previously a part of the State of Arizona and have now become a part of the State of California, or were previously a part of the State of California and have now become a part of the State of Arizona or otherwise....

1963 Ariz. Sess. Laws ch. 77, § 5, reprinted in annotation to Ariz. Rev. Stat. Ann. § 41-522 (West 1974); 1963 Cal. Stats. ch. 859, § 4, reprinted in annotation to Cal. Gov't Code § 175

(West 1980). This language has the same effect as the compact language reviewed in Wilson.[4] The acquiring state, here California, must respect title in any ceded land if that title was valid in the ceding state, here Arizona. Under the Wilson holding, therefore, the district court was obligated to apply Arizona law in formulating its jury instruction. Accordingly, we reject the appellant's contention that the district court should have modeled its instruction after California law. Although the lower court employed federal common law rather than the Arizona rule, we find no reversible error in its instruction that defined accretion as a "gradual and

imperceptible" movement. An instruction modeled on Arizona law[5] would contain the same language.[6] See State v. Jacobs, 93 Ariz. 336, 338-40, 380 P.2d 998, 1000-01, cert denied and appeal dismissed, Jacobs v. Arizona, 375 U.S. 46, 84 S. Ct. 158, 11 L.Ed.2d 108 (1963); Lusting State v. Bonelli Cattle Co., 107 Ariz. 465, 469, 489 P.2d 699, 703, supplemented, 108 Ariz. 258, 495 P.2d 1312 (1972), rev'd, 414 U.S. 313, 94 S. Ct. 517, 38 L.Ed.2d 526 (1973); State v. Gunther & Shirley Co., 5 Ariz. App. 77, 81, 423 P.2d 352, 356 (1967).[7]

III.

[3] Appellants also contend that the evidence of accretion was insufficient to support a jury verdict

and that the district court erred in denying their motion for judgment notwithstanding the verdict. We disagree. Because substantial evidence supported the verdict of accretion, the lower court did not err in denying appellants' motion.

In considering the propriety of a district court's denial of a motion for judgment notwithstanding verdict, the standard is whether, when viewing the evidence as a whole, there is substantial evidence present that could support a finding, by reasonable jurors, for the nonmoving party. Chisholm Bros. Farm Equipment Co. v. International Harvestor Co., 498 F.2d 1137, 1140 (9th Cir.), cert denied, 419 U.S. 1023, 95 S.

Ct. 500, 42 L.Ed.2d 298 (1974). Substantial evidence is more than a mere scintilla. Chisholm, 498 F.2d at 1140. It must be evidence that a reasonable mind could accept as adequate to support a conclusion. California Computer Products v. International Business Machines, 613 F.2d 727, 733-34 (9th Cir. 1979). This evidence, however, must be examined in a light most favorable to the prevailing party. Kaplan v. Burroughs Corp., 611 F.2d 286, 290 (9th Cir. 1979), cert denied, 447 U.S. 924, 100 S. Ct. 3016, 65 L.Ed.2d 1116 (1980); Chisholm, 498 F.2d at 1140. Neither the district court nor the court of appeals may weigh the evidence. Chisholm, 498 F.2d at

1140. Our task on appeal, therefore, is the same as it was for the district court. We must determine whether government introduced substantial evidence. Kaplan, 611 F.2d at 290.

In support of its argument that the river moved by accretion, the government presented expert testimony from an hydrologist who had designed the channel work for the Colorado River and from a geologist-hydro. .gist who specialized in the history of shifting streams. Their testimony included aerial photographs and a series of maps that demonstrate the gradual southerly movement of the river between 1879 and 1972. The hydrologist also testified to the hydrologic impossibility of a river

lengthening its channel by an avulsive movement. According to the government, from this evidence the jury could reasonably conclude that, in meandering, the river moved gradually by erosion and accretion.

Appellants, on the other hand, argued that the maps were unreliable and that the photographs were misleading. To support their theory of avulsion, appellants called eye-witnesses who testified to the violent and rapid changes in the river's course during the 1920's. Appellants also pointed to the repeated flooding of the river before Hoover Dam was built in 1935, claiming that uncontrollable flooding is inconsistent with the gradual process of

accretion. Finally, they relied on the testimony of expert witnesses who conducted geological surveys and found an abandoned channel that the witnesses claimed could not have existed if the river had moved slowly by accretion.

In short, the jury heard expert testimony in support of both accretion and avulsion theories. Evidence was presented on both sides and both sides were contradicted on cross-examination. Nevertheless, only substantial evidence is required to uphold the jury's verdict. The evidence presented by the government meets that standard. We, therefore, affirm the trial court's denial of appellants'

motion for judgment notwithstanding the verdict.

IV.

At trial, appellants contended that the doctrine of equitable estoppel barred the government from asserting a claim to Harvey's Fishing Hole. During the proceedings below questions of law and fact were generated on this issue and the jury returned a verdict in favor of the United States. Appellants challenge the court's instructions and the jury's verdict.

We conclude that the trial court correctly instructed the jury on equitable estoppel and that substantial evidence supported the jury's verdict. We, therefore, affirm.

A.

Two legal questions are raised concerning equitable estoppel. First, the government claims that because public lands are held in trust by the federal government for the people, see U.S. Const. Art. IV, § 3, appellants cannot assert the doctrine of equitable estoppel against the government's interest in Harvey's Fishing Hole.[8] We have observed on several occasions, however, that in a proper case equitable estoppel will lie against a government claim to title in real property. See United States v. Ruby, 588 F.2d 697, 703-05 (9th Cir. 1978), cert denied, 442 U.S. 917, 99 S. Ct. 2838, 61 L.Ed.2d 284 (1979); Skokmish Indian Tribe v. General

Services Administration, 587 F.2d 428, 433 (9th Cir. 1978); United States v. Wharton, 514 F.2d 406, 409-12 (9th Cir. 1975); United States v. Lazy FC Ranch, 481 F.2d 985, 989 (9th Cir. 1973).

[4] Nevertheless, because the United States is trustee of public lands for the benefit of the general public, we have required an additional balancing test not necessary when reviewing an ordinary equitable estoppel claim. A litigant seeking to preclude a government interest in land must prove more than the technical elements of equitable estoppel: The litigants must establish equities that, on balance, outweigh the "inherent equitable considerations which the government

asserts as the constitutional trustee on behalf of all the people." Ruby, 588 F.2d at 705.[9]

[5, 6] The second question concerns the elements of equitable estoppel. Appellants argue that affirmative misconduct is not a necessary element of equitable estoppel when asserted against the federal government and the district court erred in requiring proof of such conduct. This contention is meritless, for we have long held that affirmative government misconduct must be proven against the government. See Oki v. INS, 598 F.2d 1160, 1162 (9th Cir. 1979); Lake Berryessa Tenants' Council v. United States, 588 F.2d 267, 270-71 (9th

Cir. 1978); Ruby, 588 F.2d at 703-04; Wharton, 514 F.2d at 409-11.[10] Thus, the district court correctly instructed the jury that it must return findings on five, rather than four, elements: (1) whether the party to be estopped knew the facts; (2) whether the party to be estopped intended or could justifiably be perceived as intending its conduct to induce reliance; (3) whether the party asserting the estoppel was ignorant of the facts; (4) whether the party asserting estoppel relied upon the government's conduct; and (5) whether the government engaged in affirmative misconduct.

B.

[7] The special interrogatories

returned by the jury indicated that the appellants failed to prove: 1) ignorance of the facts; 2) reliance upon the government's conduct; and 3) government misconduct. Appellants dispute these findings.

Pointing to several instances of alleged government misconduct, appellants assert that the jury's finding that the government was not guilty of affirmative misconduct is not supported by substantial evidence. First, the appellants allege that Kindred and Donald Harvey were informed by Graham Hollister, Special Assistant to the Secretary of the Interior, at a meeting on May 8, 1961, that the government did not intend to condemn

Harvey's Fishing Hole. This conduct, however, is inactionable. Whether or not the government planned to condemn Harvey's Fishing Hole is irrelevant because the issue was whether the government planned to assert title to the land. Condemnation and assertion of title are not the same. Moreover, Hollister did advise the people at the May 8, 1961 meeting that the government planned to claim title to all land along the Colorado River.

The second ground of alleged affirmative misconduct involved a meeting in January 1963 between the Harveys and Melvin Crosby, then Assistant Administrator of the Lower Colorado Land Use Office. The letter

that provided notice of the meeting advised appellants there was "a question as to the status of the area you occupy in the Sportsmen's Paradise [Harvey's Fishing Hole] area, and discussion of this area must be deferred until a later date." Nevertheless, the issue was raised and Crosby informed the Harvey's that Harvey's Fishing Hole was being claimed as accreted land by the government. Donald Harvey testified, however, that Crosby was shown a copy of the Harvey title and that Crosby stated that the title was good. Appellants contend that Crosby's statement concerning the status of their title was inconsistent with the government's earlier claim to the accreted lands.

The fact that the Harveys had good title, however, is irrelevant to the question whether the government was asserting title to the subject land. The relevant issue was whether accretion or avulsion occurred and which title, the Harveys' or the government's, applied to the land in question.

Appellants next contend that the Harveys attempted to enter the litigation instituted by the government against different parties in Beaver v. United States, 350 F.2d 4 (9th Cir. 1965), cert denied, 383 U.S. 937, 86 S. Ct. 1067, 15 L.Ed.2d 854 (1966), a case involving a government claim to nearby land. After trial but before decision, the Harveys answered the government's

complaint in Beaver, alleging that the issues in Beaver were similar to the facts and issues affecting their interest in Harvey's Fishing Hole. The government responded by filing a motion to strike the answer, claiming that the Harveys' claim of interest "in and to the lands adjoining the [Beaver] property and premises condemned herein are totally irrelevant and immaterial to the issues of the instant action." In response to this motion and pursuant to a stipulation, the Harveys agreed to withdraw their answer without prejudice. Subsequently, the Harveys continued to sell lots, allegedly relying on the substance of the government's motion to strike.

We do not find the government's conduct in the Beaver case pertinent to the appellants' claimed reliance in this case. The government's position that the Harvey's claims were irrelevant in Beaver, an entirely different cause of action, in no way suggests that it would relinquish its claim to Harvey's Fishing Hole. Even if appellants were proper parties in the Beaver litigation, they withdrew their answer without prejudice pursuant to a stipulation. Consequently, the government's conduct was insufficient to warrant estoppel, because it "did not cause [appellants] to take action or fail to take action that [appellants] could not correct at any time." Schweiker v. Hansen, _____

U.S. ____, ____, 101 S. Ct. 1468, 1471-72, 67 L.Ed.2d 685 (1981) (per curiam).

Appellants also argue that Crosby visited Harvey's Fishing Hole on official business in 1967 and agreed with them that the property was not accreted land. Although the record indicates that Kindred Harvey did elicit this concession from Crosby, appellants also concede, and the record indicates, that official government notification of its claim to Harvey's Fishing Hole was received shortly thereafter. This notice renders spurious any contention that appellants relied on Crosby's opinion. Because appellants cannot establish the requisite reliance, we need not reach the question whether

Crosby's statement of opinion could constitute affirmative misconduct.[11]

[8] Appellants also claim that the government's failure to notify them of its claim to Harvey's Fishing Hole until 1967 establishes equitable estoppel. This assertion fails for two reasons. First, because appellants knew of the prospective government claim prior to 1967, they cannot establish reliance on the government's alleged failure to notify.[12] Second, the government's failure to notify, even if true, could not constitute affirmative misconduct because appellants have not alleged facts establishing an active or intentional concealment. Mere negligence will not suffice.[13] See TRW,

Inc. v. F.T.C., 647 F.2d 942, 950-51 (9th Cir. 1981); Lavin v. Marsh, 644 F.2d 1378, 1383 (9th Cir. 1981); Simon v. Califano, 593 F.2d 121, 123 (9th Cir. 1979); Santiago v. I.N.S., 526 F.2d 488, 493 (9th Cir. 1975), cert denied, 425 U.S. 971, 96 S. Ct. 2167, 48 L.Ed.2d 794 (1976).

Appellants have failed to prove the necessary elements of estoppel. Because there has been an inadequate showing of equitable estoppel, we need not consider the additional balancing test required when equitable estoppel is asserted against the government.

AFFIRMED.

*Honorable Earl R. Larson, United States District Judge for the District of Minnesota, sitting by designation.

1/ Appellants do not contest the lower court's damages assessment. They argue, instead, that they were not liable.

2/ Section 1014 provides:

> Where, from natural causes, land forms by imperceptable degrees on the bank of a river, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank subject to any right of way over the bank.
>
> Cal. Civ. Code § 1014 (West 1954) (emphasis added).

3/ See Interstate Boundary Compact Defining The Boundary Between the States of Arizona and California, Pub. L. 89-531, 80 Stat. 340 (1966).

4/ The Iowa-Nebraska compact provides:

> Sec. 2. The State of Iowa hereby cedes to the State of Nebraska and relinquishes jurisdiction over all lands now in Iowa but lying

westerly of said boundary line and continguous to lands in Nebraska.

Sec. 3. Titles, mortgages, and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa and any pending suits or actions concerning said lands may be prosecuted to final judgment in Nebraska and such judgments shall be accorded full force and effect in Iowa.

See Act of July 12, 1943, ch. 220, 57 Stat. 494.

5/ Unlike Cal. Civ. Code § 1014, the Arizona common law definition does not expressly focus upon "natural"causation. See generally, State v. Bonelli Cattle Co., 107 Ariz. 465, 467, 489 P.2d 699, 701, supplemented 108 Ariz. 258, 495 P.2d 1312 (1972), cert granted, 410 U.S. 908, 93 S.Ct. 957, 35 L.Ed.2d 269, rev'd on other grounds, 414 U.S. 313, 94 S.Ct. 517, 38 L.Ed.2d 526 rehearing denied, 434 U.S. 1090, 98 S.Ct. 1290, 55 L.Ed.2d 797 (1973); State v. Jacobs, 93 Ariz. 336, 338, 380 P.2d 998, 1000-1001, cert. denied and appeal dismissed sub nom. Jacobs v. Arizona, 375 U.S. 46, 84 S.Ct. 158, 11 L.Ed.2d 108 (1963); State v. Gunther &

Shirley Co., 5 Ariz.App. 77, 81, 423 P.2d 352, 356 (1967).

6/ Even though the district court "did the right thing for the wrong reason", we must affirm its judgment. We must affirm if the result is correct. Helvering v. Gowran, 302 U.S. 238, 245, 58 S.Ct. 154, 158, 82 L.Ed. 224 (1937); United States v. Best, 573 F.2d 1095, 1100-01 (9th Cir. 1978); United States v. Stevens, 548 F.2d 1360, 1363 n.9 (9th Cir.), cert. denied, 430 U.S. 975, 97 S.Ct. 1666, 52 L.Ed.2d 369 (1977).

7/ Appellants contend that accretion under Arizona law is confined to "natural" accretion. Bonelli, however, only held that "[w]here a river shifts to a new location as a result of unnatural forces, the state does not lose title to the bed of the stream in the old location." Bonelli, 107 Ariz. at 469, 489 P.2d at 703 (emphasis added). Bonelli did not involve an upland private claimant. Moreover, even the federal common law, consistent with the majority common law rule, recognized the rule that an upland owner could not benefit from self-employed intentional accretions. Bonelli 414 U.S. at 323, 94 S. Ct. at 524-25. See

Schaffer v. Schnabel, 494 P.2d 802, 807 (Alaska 1972); Board of Trustees v. Medeira Beach Nom., Inc., 272 So.2d 209, 212 (Fla. App. 1973); Brundage v. Knox, 279 Ill. 450, 452, 117 N.E. 123, 125 (1917); State by McKay v. Sause, 217 Or. 52, 55, 342 P.2d 803, 806 (1959). Consequently, appellants' contention that a new trial is necessary in order to present a fuller demonstration of artificial accretion is meritless. Under Bonelli, such evidence was relevant. Indeed as appellants admit, they expended much energy at trial on the issue of artificial causation.

8/ Because the Constitution explicitly entrusts to Congress the "power to dispose of and make all Rules and Regulations respecting the Territory and other property belonging to the United States", U.S. Const. Art. IV, § 3, cl. 2, the principle of separation of powers is directly implicated when equitable estoppel is sought to be applied against a federal claim to title in land. Although Congress may delegate administrative responsibilities to executive agencies, United States v. Cassiagrol, 420 F.2d 868, 876-77 (4th Cir.), cert denied, 397 U.S.

1044, 90 S. Ct. 1364, 25 L.Ed.2d 654 (1970), the property clause has been interpreted as exclusive and "without limitations". United States v. City & County of San Francisco, 310 U.S. 16, 29, 60 S. Ct. 749, 756, 84 L.Ed. 1050 (1940). Consequently, when Congress has not authorized a disposition of federal lands, the application of a remedy such as equitable estoppel against a federal claim or defense tends to frustrate the intent of a specific constitutional provision.

9/ The United States contends that appellants cannot rely on 28 U.S.C. § 2409a (1976) in asserting that the United States is estopped from claiming title to the disputed accretions. Because we held in Ruby that, under common law principles, offensive and defensive use of equitable estoppel against the United States in quiet title actions may be appropriate, we need not decide the statutory question. See Ruby, 588 F.2d at 700, 703 (in quiet title action by government, defendant's estoppel counterclaim could succeed if affirmative misconduct established).

10/ The Supreme Court recently observed that it has never decided what type of conduct by a government official would estop the goverment, or "whether even 'affirmative misconduct' would estop the government." Schweiker v. Hansen, ___ U.S. ___, 101 S. Ct. 1468, 1470-71, 67 L.Ed.2d 685 (1981).

11/ See Schweiker, ___ U.S. at ___, 101 S. Ct. at 1470-71 (negligent misstatement will not support equitable estoppel against government); Lavin v. Marsh, 644 F.2d 1378, 1383 (9th Cir. 1981) (citing Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384-85, 68 S. Ct. 1, 3-4, 92 L.Ed. 10 (1947)) (persons dealing with government must assume that government agents may exceed their authority and provide misinformation).

12/ The Harveys' contention that they were ignorant of the government's claim is frivolous. In 1960, they were served with a complaint in the Beaver litigation and in 1963, they filed a belated answer in the same action. Furthermore, the Harveys concede that a meeting on May 8, 1961, the Special Assistant to the Secretary of Interior had informed

them that the government might claim land along the lower Colorado River.

Nor can those who purchased from the Harveys claim ignorance. On September 5, 1961, the federal survey of the disputed land was recorded in the public land office record and, on August 25, 1961, in the Federal Register. These purchasers had constructive notice of the government's claim. See Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 383-86, 68 S. Ct. 1, 2-4, 92 L.Ed. 10 (1947); Lavin v. Marsh, 644 F.2d 1378, 1383 (9th Cir. 1981); United States v. Consolidated Mines & Smelting Co., 455 F.2d 432, 447 (9th Cir. 1971); Gaylord v. CIR, 153 F.2d 408, 416 (9th Cir. 1946).

13/ Appellants contend that the jury's verdict is internally inconsistent because it found the absence of affirmative government misconduct, yet it also found that the federal officials intended to induce reliance. We disagree. An absence of affirmative misconduct and the presence of an intent to induce reliance are not inconsistent if the conduct intended to be relied upon were negligent misconduct.

(ENTERED/FILED)
(CLERK, U.S. DISTRICT COURT)
(SOUTHERN DISTRICT OF CALIFORNIA)
(BY DEPUTY)
(October 15, 1974)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 72-277-T

UNITED STATES OF AMERICA,

Plaintiff,

v.

IVA MAY HARVEY, Widow, et al.,

Defendants.

ORDER DENYING DEFENDANTS' AND PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT

BACKGROUND

The United States brought an action to eject against approximately 150 defendants who claim ownership to land in a twenty-seven acre subdivision known as "Harvey's Fishing Hole," located on the California side of the Colorado River two miles south of

Blythe. The defendants counterclaimed with a suit to quiet title.

All except four of the defendants are the successors in interest of Kindred E. Harvey, now deceased, who in turn claimed ownership through a chain of title originating in a patent deed of 1914.

In 1914 the land in question was located south of the Colorado River in Arizona. The United States owned the northern bank on the California side of the river. Sometime prior to 1935 the course of the river shifted to the south. As a result, the land in question is now north rather than south of the river.

Ownership of the land depends on whether it became part of the northern bank by process of accretion or avulsion. If form by accretion, it probably

belongs to the United States, who has always owned the northern bank. If formed by avulsion, it more likely belongs to the defendants.

Property directly adjoining Harvey's Fishing Hole and occupying the same bend in the river was the subject of a government condemnation action which commenced in 1960. In Beaver v. United States, 350 F.2d 4 (9th Cir. 1965), the Ninth Circuit affirmed Judge Kunzel's determination that the adjoining property was formed by process of accretion and belonged to the United States.

MOTIONS

Both the United States and the defendants have moved for summary judgment and the matter came on for hearing

on October 7, 1974. Having heard argument and reviewed the extensive memoranda and affidavits submitted by the parties, the court makes the following orders:

1. Defendants' motion for summary judgment on the basis of the affidavits of Lewis G. Castner, Jack R. Rodges, Iva Mae Harvey and Donald Harvey. These affidavits support the so-called "cottonwood tree" argument. They indicate that the studies of an arborist and a radiologist show that certain trees located on Harvey's Fishing Hole existed prior to the 1914 patent deed. The inference to be drawn is that these trees would have been eroded away during an accretive process; their survival proves the change in the course of the river was avulsive.

The Court finds the argument intriguing but not conclusive. In direct conflict is the affidavit of John S. Ewan, a hydraulic engineer employed by the United States Department of Interior. He states the river bend was formed by process of accretion. Whether the court should credit the view of the arborist or the hydrologist can be determined only by trial. This motion for summary judgment is denied.

2. Defendants' motion for summary judgment under the Color of Title Act (43 U.S.C. 1068, et seq.). Since the court cannot determine whether the land was formed by accretion or avulsion, it cannot determine whether the defendants are entitled to a patent under the Color of Title Act. As indicated in Beaver v. United States, 350 F.2d 4, 10 (9th Cir.

1965), the government property on the northern side of the river was withdrawn from entry in 1902 and therefore is not subject to the Color of Title Act. If Harvey's Fishing Hole is part of the government property by virtue of accretion, the Color or Title Act cannot apply to it. It is difficult to see a claim under the Color of Title Act can benefit the defendants in any event. If there was accretion, they cannot assert the claim; if there was avulsion, they probably own the land without asserting a claim under the Act. This motion for summary judgment is denied.

3. Defendants' motion for summary judgment on the basis of estoppel. The defendants assert this theory as a defense to the government's suit to eject

and as an affirmative ground in their counterclaim to quiet title.

The defendants argue that, regardless of whether the land was formed by accretion or avulsion, the government is estopped to deny their ownership of the land because they have occupied and improved it in reliance on statements by various government representatives in the Bureau of Land Management, the Army Corps of Engineers, and the United States Attorney's Office. For instance, it is alleged that the U.S. Attorney assured the Harveys in 1963 that the Beaver litigation would not affect them, and, inferentially, that the government recognized title in the Harveys. Furthermore, it is alleged that:

> [P]rior to 1967, the right, title and interests of the

> [Harveys]...to the lands involved in the present controversy, were readily and consistently recognized, acknowledged and conceded by representatives of the United States. (Affidavit of Iva Mae Harvey, p. 5)

Generally equitable estoppel is not available against the United States. Utah Light and Power Co. v. United States, 243 U.S. 389 (1917). But in recent years an exception has developed where (1) the government is acting in its proprietary rather than sovereign capacity, and (2) if its representative has been acting within the scope of its authority. United States v. Georgia-Pacific, 421 F.2d 92 (9th Cir. 1970); Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970); United States v. Lazy FC Ranch, 481 F.2d 985 (9th Cir. 1973); Oil-Shale Corporation v. Morton, 370 F.Supp. 108

(D.C. Colo. 1973). There is no showing that either of these threshold requirements are fulfilled.

However, the court finds that it is unnecessary to meet these threshold requirements in this case because of the enactment of 28 U.S.C. 2409a (Real Property Quiet Title Actions), which provides, in pertinent part:

> (a) The United States may be named as a party in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest. . . .
>
> . . . .
>
> (f) Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in

> interest knew or should have known of the claim of the United States.
>
> . . . .
>
> (g) Nothing in this section shall be construed to permit suits against the United States based on adverse possession.

As stated in Beaver, supra, p. 7, the general rule that equitable estoppel does not apply against the United States does not attain where the United States has consented to be sued in quiet title actions by virtue of § 2409a.

The government contends that the defendants cannot assert § 2409a because, by expressly excluding adverse possession, Congress also excluded equitable estoppel. The legislative history on this point is inconclusive. However, the court notes that the two theories,

though similar, are distinct; the court concludes that the express exclusion of adverse possession indicates an intent to include all other theories of action, including equitable estoppel to the extent it is available in any suit to quiet title. Expressio unius est exclusio alterius.

The defendants may properly assert estoppel in their answer and counter-claim. However, the defendants have not met the burden of showing the absence of any issue as to all the material facts, which, under the applicable principles of substantive law, entitle them to judgment as a matter of law. The substantive law of estoppel has been defined by the Ninth Circuit as follows:

> "Four elements must be present to establish the

> defense of estoppel: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury. California State Board of Equalization v. Coast Radio Products, 9 Cir., 228 F.2d 520, 525." United States v. Georgia-Pacific, 421 F.2d 92, 96 (9th Cir. 1970)

This court thinks that there are material issues of fact as to all of these elements, and directs the attention of counsel especially the second and third elements. As to the third, the defendants may have known the fact that their title was controverted because of

the existence of the Beaver litigation, which affected the property next door. It may well develop, as argued by defendants, that contemporaneous and subsequent representations by government officials had the effect of assuring the defendants that Beaver was of no significance. This argument would involve the proof of the second element of estoppel, namely, that the government representatives acted in a way that justified reliance by the defendants. The defendants have not clearly shown what the truth is in this regard. The affidavit of Iva Mae Harvey contains many conclusory statements such as the one quoted above. This kind of information does not help the court determine exactly what was said, by whom, to justify the reliance of the defendants. The alleged

assurance from the U.S. Attorney to the Harveys' lawyer that the Beaver case would not affect the Harvey land is similarly vague. Even if it is accepted that the U.S. Attorney stated that "Their respective rights would not be prejudiced in any way the ultimate decree in the Beaver case" (Affidavit of Iva Mae Harvey, p. 12), the meaning of this statement is wholly unclear in the context of the affidavits now before the court. It could mean that the United States would never challenge the Harveys' title, or merely that the Beaver decision of itself would not affect the Harveys' title. Furthermore, much of the Iva Mae Harvey affidavit pertaining to the discussions with the U.S. Attorney and other government representatives contains hearsay which is improper under

Fed.R.Civ.P. 56(e). The Court has reviewed all the affidavits including those of Beverly Truelove, Ralph Brookings, Neil John, and Donald Harvey, and finds that they do not adequately show that the government induced reliance. This motion for summary judgment is denied.

4. Defendants' motion for summary judgment on the basis of P.L. 91-505. This legislation permits certain claimants to Colorado River properties in Riverside County to assert all legal and equitable defenses against the government in ejectment actions. The defendants argue that this law unfairly discriminates against them and that the court should excise certain words from the statute which limit its application to Riverside County,

and thereby extend its benefits to all claimants of Colorado River lands. The court denies the motion because striking the relevant language would defeat the legislative intent. A similar bill lacking the restrictive language was previously vetoed by the President; its proponents did not muster the necessary two-thirds vote to override the veto. The defendants cannot expect the court to override the President's veto where Congress has failed to do so.

5. Government's motion for summary judgment by asserting Beaver as a ground for collateral estoppel. The U.S. Attorney cites the following standard for collateral estoppel:
(1) Was the issue decided in the prior adjudication identical with the one

presented here? (2) Was there a judgment on the merits? (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? (4) Was the party given an opportunity to be heard? Bernhard v. Bank of America, 19 Cal.2d 807 (1942); State of Maryland v. Capitol Airlines, Inc., 267 F.Supp. 298,304 (D Md. 1967).

The third and fourth elements have not been satisfied. Kindred Harvey, the predecessor in interest to all but four of the defendants, was not in privity with any of the defendants in the Beaver litigation. Nor was he a party who had the opportunity to be heard. Although named and served in the Beaver action, his property was not within the pale of the 11.8 acres condemned in that

action. When Harvey filed a belated answer, the U.S. Attorney moved to strike on a number of grounds, one of which was that the Harveys' claims of an interest in adjoining lands was immaterial. Subsequently the Harveys' answer was withdrawn without prejudice by stipulation and order. On the present record, the court can only conclude that, although named in the complaint, the Harveys were not proper defendants to the action, and that the decision in the Beaver case cannot now be raised against the Harveys and their successors in interest. This motion for summary judgment is denied.

6. Government's motion for partial summary judgment on the ground that a claim under § 2409a is barred by the twelve year statute of limitations. Kindred E. Harvey was served with notice

of the government's claim in the Beaver case on October 14, 1960. The defendants' counterclaims were filed more than twelve years later; therefore the government argues that the defendants should be barred by the twelve year statute of limitations in § 2409a(f). However, whether or not the Harveys and other defendants "should have known of the claim of the United States" may be determined, in part, by the alleged representations to the Harveys by government officials as late as 1967. Also, it is not clear that the notice of the condemnation suit involving neighboring property adequately put the Harveys on notice that their own

property would be subject to an ejectment action. The government's motion is denied.

DATED: October 11, 1974

s/ Howard B. Vintino
United States District Judge

COPY TO: All counsel

(CLERK, U.S. DISTRICT COURT)
(SOUTHERN DISTRICT OF CALIFORNIA)
(BY DEPUTY)
(LODGED - February 17, 1976)
(FILED - March 1, 1976)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

No. Civil 72-277-T

UNITED STATES OF AMERICA,

Plaintiff,

vs.

IVA MAY HARVEY, a widow, et al.,

Defendants.

PRE-TRIAL CONFERENCE ORDER

Following pre-trial proceedings pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule 9 of this Court, IT IS ORDERED:

1. This is a civil action brought by the United States against approximately 150 defendants for damages and seeking to eject them from

certain real property located near Blythe, California, and described by plaintiff in its Complaint as follows:

> Section 9, Township 9 South, Range 22 East, San Bernardino Meridian, Portions of Lots 1, 2, 5 and 6.

The defendants have counterclaimed against the United States to quiet and extinguish all right, title or interest which the United States may claim in the property. The issues in the action are raised by the Complaint, defendants' Answers and Counterclaims, and plaintiff's Replies to Counterclaims.

2. Jurisdiction and venue of the Court is invoked under the provisions of Title 28 U.S.C., Sections 1345, 1346(f), and 1402(d).

3. The facts described in Appendix "A", attached hereto, are

admitted and require no proof at trial.

4. The following issues of fact, and no other, remain to be litigated at the trial:

a. Whether the real property described by plaintiff in the Complaint as:

> Township 9 South, Range 22 East, San Bernardino Meridian, Section 9: Portions of Lots 1, 2, 5 and 6 was formed by the process of accretion or by avulsive movements of the Colorado River.

b. What damages if any is the United States entitled to if it prevails.

c. Whether the United States is estopped or barred

to deny the defendants' ownership of the property in issue here.

5. The exhibits to be offered at the trial, together with a statement of all admissions by and all issues between the parties with respect thereto, are described in Appendix "B" attached hereto.

6. The plaintiff may call the following witnesses at trial:

a. Dr. C. W. Ferguson

b. Dr. Hans Suess

c. Ernest Pemberton

d. John A. McEwan

e. Stanley Wagner

f. Richard Hadley

g. Albert Romeo

h. Melvin S. Crosby

i. Fern Blair

j. All defendants

k. Damage witness

l. Richard F. Goulette

m. Lillian M. Goulette

The defendants may call the following witnesses at trial:

a. Jack R. Rogers

b. Dr. Ranier Berger

c. Dr. Roy J. Shlemon

d. Dr. Eugene Begg

e. Employee of Teledyne Geotronics

f. Louis Caster

g. Manuel Lopez

h. Iva May Harvey

i. Donald G. Harvey

j. Albert Romeo

k. Melvin S. Crosby

l. Other defendants.

m. S. M. Mason

7. The following issues of law, and no others, remain to be litigated upon the trial:

a. Whether estoppel and all other rights, remedies, and defenses, except adverse possession, are available to the defendants and counter-claimants herein.

b. Whether there is a presumption of accretion and, if so, how is it established.

c. The legal standards for proving accretion or avulsion.

d. Whether the United States is entitled to damages if it prevails and the measure thereof.

e. Was the center of the Colorado River the boundary

between Arizona and California at all times pertinent herein.

f. Whether a withdrawal of public lands by the Secretary of the Interior precludes private rights from being perfected on said lands by estoppel or other rights and remedies.

8. The foregoing admissions having been made by the parties, and the parties having specified the foregoing issues of fact and law remaining to be litigated, the order shall supplement the pleadings and govern the course of the trial of the cause, unless modified to prevent manifest injustice.

DATED: 3/1/76

s/ Howard B. Turrestine
UNITED STATES DISTRICT JUDGE

Approved as to form and content.

s/ Michael E. Quinton
Michael E. Quinton, Assistant
U.S. Attorney, Attorney for Plaintiff

MARINOS & STYN

BY: s/ Ronald Styn
Ronald Styn

McCANN & SHEBLEY

BY: s/ Floyd H. Shebley
Floyd H. Shebley

DUNCAN, BROWN, WEINBERG & PALMER

BY: s/ Jay R. Weill
J. R. Weill

Attorneys for Defendants

APPENDIX "A"

STIPULATION OF FACTS

The following facts are stipulated and require no proof at trial:

(1) This is a civil action brought by the United States of America against approximately 150 defendants seeking to eject and remove them from certain real property (hereinafter referred to as the property) located near Blythe, California, and described by plaintiff in its Complaint as follows:

Township 9 South, Range 22 West, San Bernardino Meridian, Section 9: Portions of Lots 1, 2, 5 and 6.

In addition, if the Court should find the government to be the owner of the property in issue here, then the

United States seeks to recover damages against each of the defendants in the amount of the reasonable yearly rental value of the property from the date the defendants have had possession of the property to and until the time the Court should award the United States exclusive possession of the property.

(2) The defendants have counter-claimed against the United States to quiet and extinguish any right, title or interest which the United States may claim in the property.

(3) The property in issue here is known as "Harvey's Fishing Hole" or alternatively as "Sportsmen's Paradise."

(4) In 1902 certain land was surveyed by the United States and legally described as:

SW1/4 NW1/4 Section 21
Township 1 North, Range
23 West, Gila and Salt
River Meridian, Yuma
County, Arizona.

These lands were then located near the Arizona side of the Colorado River which was South of the river channel as it existed in 1902.

(5) On January 13, 1914, the United States conveyed the land described in paragraph (4) above to Cherry S.E. Carlin by Patent No. 381486. The patent was recorded in the County of Yuma, State of Arizona, in Docket 66, page 293. The lands were described in the patent as follows:

SE1/4 of the NE1/4 and the
NE1/4 of the SE1/4 of Section
20 and the SW1/4 of the NW1/4

and the NW1/4 of the SW1/4 of Section 21 in Township One north Range 23 west of the Gila and Salt River Meridian, Arizona, containing 160 acres.

(6) The chain of title on the land described in paragraph (4) from the January 13, 1914 patent from the United States to Cherry S.E. Carlin is as follows:

a. Deed from Cherry S.E. Carlin, a single man, to W.A. Carlin, recorded in Book 37 of Deeds, page 307.

b. Deed from W.A. Carlin and Grace Carlin, his wife, to Sam Thompson, recorded in Book 61 of Deeds, page 473.

c. Deed from John Garfield Eckles to Fred Wardle, recorded in Book 74 of Deeds, page 295.

d. Treasurers Deed to the State of Arizona, recorded in Book 98 of Deeds, page 261.

e. Deed from the Board of Supervisors of Yuma County, to Richard F. Goulette and Lillian M. Goulette, his wife, recorded in Book 109 of Deeds, page 465.

f. Judgment quieting title in Richard F. Goulette and Lillian M. Goulette, his wife, recorded in Docket 66, page 294.

(7) On November 10, 1952, the land described in paragraph (4) was conveyed to Kindred E. and Iva May Harvey by Richard F. and Lillian M. Goulett

At that time the deed described the land as:

> Southwest Quarter (SW1/4) of Northwest Quarter (NW1/4) of Section 21, Township 1 North, Range 23 West, consisting of approximately 40 acres, Gila and Salt River Base and Meridian, Yuma County.

(8) On January 13, 1914, when the Patent was issued by the United States of America to Cherry S.E. Carlin, the land was located south of the Colorado River in the State of Arizona. Between 1914 and 1935, the channel of the Colorado River moved in a southerly direction until it established the channel approximately in its present location.

(9) In 1960, the United States surveyed the property in issue here which is in the same geographical and physical location as the land described in paragraph (4) above and described it as a portion of Section 9, Township 9 South, Range 22 West San Bernardino Meridian, State of California.

(10) Portions of Lots 1, 2, 5 and 6, Section 9, Township 9 South, Range 22 East, San Bernardino Meridian, which is the property in issue here occupies the same geographical and physical location at the SW1/4 NW1/4 of Section 21 Township 1 North, Range 23 West, Gila and Salt River Meridian, Yuma County, Arizona, which was the land conveyed to Kindred E. and Iva May Harvey on November 10, 1954.

(11) Following the acquisition by Kindred E. and Iva May Harvey of a deed

to the land described in paragraph (4), property taxes were paid to Yuma County, Arizona. In this regard, the land described in pargaraph (4) here was on the tax rolls of the County of Yuma, State of Arizona, until 1966, when the Congress of the United States formally ratified the Colorado River Boundary Compact between the states of Arizona and California (See Public Law 89-531 and California Government Code, Section 175 et seq.). Until the effective date of Said Compact, property taxes were assessed by the County of Yuma and paid by the defendants on the land described in paragraph (4) above.

(12) Beginning in 1956, Kindred E. Harvey began the planning and development of a recreation - residential community consisting of some ninety-six (96) lots

to be located on the property in issue here.

(13) During the period of 1956 and 1957, a large portion of the property in issue here was cleared of natural vegetation in preparation for the development of a receational and residential community. The clearing and preparation of said lands for development was done openly and was observable by representatives of the United States, including representatives of the U.S. Bureau of Reclamation.

(14) In 1956, Kindred E. Harvey applied to the State of California for a permit to sell within the State of California lots on the property which is the subject of these proceedings. In 1956 after reviewing the aforesaid application for a subdivision permit, the

State of California issued a subdivision permit to Kindred E. Harvey and furnished to him a subdivision report. Thereafter, final development of the property in issue was commenced.

(15) In 1958 as development of the subdivision commenced, Kindred E. and Iva May Harvey commenced the sale of lots to a third parties, many of whom are named as co-defendants in the above mentioned proceedings. To date, approximately eighty (80) lots have been sold by Kindred E. and Iva May Harvey, to third parties, all of whom have at various times occupied said lots and many of whom have placed improvements on said lots.

. . . .

Appendix "A"

(FILED/ENTERED)
(CLERK, U.S. DISTRICT COURT)
(SOUTHERN DISTRICT OF CALIFORNIA)
(BY DEPUTY)
(January 14, 1977)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 72-277-T

UNITED STATES OF AMERICA,

Plaintiff,

v.

IVA MAY HARVEY, a widow, et al.,

Defendants.

MEMORANDUM AND ORDER DENYING MOTIONS FOR JUDGMENT NOTWITHSTANDING VERDICT AND FOR NEW TRIAL

Defendants' motions for judgment notwithstanding verdict, and for new trial came on for hearing January 10, 1977. The court, having considered the evidence adduced at trial, the memoranda submitted in support of the motions, and the argument of counsel, concludes

that all motions must be denied in all respects.

On November 23, 1976, the jury returned a general verdict for the United States of America, along with answers to nine special interrogatories. The verdict and the answers to the interrogatories reflect the jury's conclusions that the described land, known as Harvey's Fishing Hole, was formed by the process of accretion and thus entitling the United States to possession of such accreted land; that the government was not estopped from asserting its right to possession; and, that the government should be compensated in an amount equal to the reasonable rental value of the respective parcels occupied by the defendants.

In the motions pending, defendants raise evidenciary and instructional errors. In addition they challenge the sufficiency of the evidence to support the jury's findings on the questions of accretion-avulsion, estoppel, and damages.

When deciding a motion for judgment n.o.v., the court must view the evidence in a light most favorable to the prevailing party. The court may not weigh or evaluate credibility. So viewed, to grant such a motion, the court must be able to conclude the evidence presented by the prevailing party is insufficient to support the verdict as a matter of law. The presence of substantial evidence is sufficient to withstand the motion.

5A Moore, Fed. Practice ¶50,07[2]; 9 Wright, Miller & Cooper, Fed. Practice & Procedure §§2524-2529, 2537; F.R. Civ.P., Rule 50. Defendants have met all prerequisites required by Rule 50(b) enabling the court to hear the motion.

Rule 59(a), F.R.Civ.P., authorizes a motion for new trial. Of such a motion, the Supreme Court states:

> The motion for a new trial may invoke the discretion of the court in so far as it is bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; and

> may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury.

Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251 (1940).

In deciding whether the weight of the evidence is against the verdict, the court is not required to view the evidence most favorably to the prevailing party. Instead, the court may weigh the evidence, giving full respect to the findings of the jury. If from the entire evidence, the court is left with the firm conviction a mistake has occurred, it may, in its discretion, grant a new trial. The court, however, cannot set aside a verdict simply because

it might have reached a conclusion different from that of the jury on the same evidence; more must appear. Beveridge Distributors, Inc. v. Olympic Brewing Co., 440 F.2d 21 (9th Cir. 1971), cert. denied, 403 U.S. 906 (1971); see generally 6A Moore, Fed. Practice ¶59.08[5]; 9 Wright, Miller & Cooper, Fed. Practice & Procedure §2806.

Similarly, the question of whether a jury's assessment of damages is excessive, is a matter addressed to the sound discretion of the court. Again, the court is to avoid substituting its judgment for that of the jury, unless it appears the particular award of damages is unconscionable or grossly excessive. 6A Moore, Fed. Practice ¶59.08[6].

Initially, defendants challenge the sufficiency of evidence to support the jury's finding that the land known as Harvey's Fishing Hole was formed by the process of accretion. Suffice it to say that both plaintiff and defendants offered extensive, sharply contradicting expert testimony on the question of avulsion and accretion. Plaintiff's witnesses all testified Harvey's Fishing Hole was formed by the process of accretion; defendants' witnesses testified to the contrary. The court concludes substantial evidence for the jury's finding is present, and denies the motion for judgment n.o.v. on this ground. The evidence was evenly balanced, clearly presenting a question for the jury; the weight evidence does not preponderate in favor of defendants.

Secondly, defendants challenge the sufficiency of the evidence to support the jury's negative answers to Special Interrogatories numbered 3, 6, and 7, each of which relate to one of the five elements of estoppel. To have prevailed on the affirmative defense of equitable estoppel, the defendants had the burden of proving all five elements, which in turn required affirmative answers to Special Interrogatories numbers 2, 4, 5, 6, and 7.

Special Interrogatory No. 3 sought a finding whether the government engaged in affirmative conduct which amounted to a representation of material facts. The jury answered in the negative. The defendants contend the uncontradicted evidence showed that the government, through its agents, made

certain representations to the effect that it had no intention of claiming Harvey's Fishing Hole. The record does not support the contention. As an example, it appears from the testimony of Melvin Crosby, Special Assistant to the District Manager of the Lower Colorado River Land Use Office, Department of Interior, that defendants were generally advised of the government's claims to the land as early as 1962. It also appears from his testimony that Iva May, Kindred and Don Harvey were told by Crosby that the government intended to claim the land under the doctrine of accretion in January 1963. Crosby's testimony alone is substantial evidence supporting the jury's finding. While it is true that

Crosby's testimony may be deemed contradictory in some respects, the fact remains, his testimony, if believed by the jury, supports the finding.

Special Interrogatory No. 6 sought a finding whether defendants were ignorant of the true facts concerning the government's claim to Harvey's Fishing Hole. The jury answered in the negative, finding that the defendants were not in fact ignorant of the government's claims. There is ample evidence to support this finding. Again, using Crosby's testimony as an example, it is clear that the Harveys, who subdivided and marketed the land, had knowledge that the government disputed title to the land, and that it intended to claim it under an accretion theory. It is also clear that defendants

were aware that the Colorado River had moved or changed its course at various times antedating defendants' occupation of Harvey's Fishing Hole. The jury's finding is supported by substantial evidence.

Special Interrogatory No. 7 sought a finding whether the defendants relied upon the conduct of the government to their injury. The jury answered in the negative. Defendants' contention on this point is premised on the court's acceptance of their argument as to Special Interrogatories numbered 3 and 6. Since the court has rejected those arguments, and no additional arguments are made, defendants' position as to Special Interrogatory No. 7 is untenable.

Thus, it appears each of the contested findings is supported by substantial evidence. While on some points the evidence might be deemed less than overwhelming, the court is not convinced the conclusions reached by the jury are such that warrant the granting of a new trial. The court is not convinced a mistake has occurred, and accordingly declines to exercise its discretion in favor of granting a new trial.

Thirdly, defendants seek a new trial on the issue of damages. The jury, in Special Interrogatories numbered 8 and 9, concluded the government was entitled to an award of damages. The jury specified the exact sum attributable to each defendant. Defendants first contend that since the government did not formally claim the land known as Harvey's

Fishing Hole until 1967, it is unconscionable that any award for damages for the period of 1960 to 1967 be allowed to stand. While the government's evidence did reflect calculations dating from 1960, the jury awarded an amount far less than that claimed by the government. Thus, it is possible that the jury took into account the factors argued by defendants. In any event, the evidence on the issue of damages introduced by the government was virtually uncontradicted. It cannot, therefore, be said that the weight of the evidence preponderates in favor of the defendants.

The second point raised by defendants on this issue, is that the sum of the individual itemized damages listed in Special Interrogatory No. 9, does not equal the amount entered in the

general verdict. That is, the sum of the items listed on Special Interrogatory No. 9 is $41,842.85, whereas the amount entered on the general verdict is $42,451.04, or a discrepancy of $608.19. Defendants contend this requires the granting of a new trial. The contention is not well taken for two reasons. First, the jury was told by the court it was to itemize damages as to each defendant, if they reached the issue, in the answer to Special Interrogatory No. 9. The jury was then told it need not total the itemizations, and that it could leave the general damages portion of the general verdict in favor of plaintiff blank. The reason for the instruction was simply to avoid what has occurred: a mathematical computation error. In any event, individual judgments have been issued upon

the amounts set out in Special Interrogatory No. 9.

Secondly, the court may in its discretion elect to follow the more specific answers of a jury which are contained in special interrogatories, 6A Moore, Fed. Practice ¶59.08[4], at 59-141, where the latter are inconsistent with the jury's general verdict. Here, in light of the court's instructions to the jury, the court elects to authorize judgments for the amounts itemized in the Special Interrogatory No. 9. Accordingly, defendants' motions as to the questions of damages are denied.

Lastly, wholly apart from the sufficiency of evidence contentions, defendants advance arguments that

various evidenciary rulings and instructional errors require the court to grant a new trial. The court has reviewed these contentions and concludes none of the contentions requires the granting of a new trial.

Accordingly, for the foregoing reasons,

IT IS ORDERED that defendants' motions for judgment n.o.v. and for new trial be and the same are hereby denied in all respects.

DATED: January 14, 1977.

s/ Howard B. Turrestine
United States District Judge

COPY TO:

ALL COUNSEL

(ENTERED)
(CLERK, U.S. DISTRICT COURT)
(SOUTHERN DISTRICT OF CALIFORNIA)
(BY DEPUTY)
(January 18, 1977)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 72-277-T

UNITED STATES OF AMERICA,

Plaintiff,

v.

IVA MAY HARVEY, a widow, et al.,

Defendants.

ORDER RE COUNTERCLAIMS

The above-entitled matter came on regularly for trial on the defendants'

counterclaims on November 9, 1976. Trial on the counterclaims was conducted to the court on November 9, 10, 11, 12, 16, 17 and 18, 1976. The court, having heard the evidence offered by the plaintiff and by the counterclaimants and having considered the pleadings, memoranda and arguments of counsel, and being fully advised in the premises, hereby makes the following:

FINDINGS OF FACT

1. The land which is the subject of this action described as

> Township 9 South, Range 22 East, San Bernardino Meridian, Section 9: Portions of Lots 1, 2, 5 and 6, also known as Harvey's Fishing Hole and Sportmen's Paradise,

was formed by the process of accretion.

2. The above-described real property which is the subject of this action, did not arrive in its present position by the process of avulsion.

3. When the above-described land was formed as accretion land, it was formed as accretion to lands owned by the plaintiff, United States of America.

4. Between November 10, 1952, the date on which the Southwest Quarter of the Northwest Quarter (SW 1/4 NW 1/4), of Section 21, Township 1 North, Range 23 West, Gila and Salt River Base and Meridian, Yuma County, Arizona, was conveyed to Kindred E. and Iva May Harvey, and July 17, 1972, the date of the filing of the complaint in this action, agents of the plaintiff, United States of America, communicated with several of the counterclaimants relative to the

claim of the United States to title to the land which is the subject of this action.

5. At no time did any agent of the plaintiff, United States of America, engage in affirmative conduct which amounted to either a misrepresentation of facts or a concealment of material facts relating to the claim of the United States to title to the land which is the subject of this action.

6. All of the defendants and counterclaimants have, from time to time, occupied a part of the land which is the subject of this action.

7. At the time the defendants entered and began occupancy of the land which is the subject of this action, described in paragraph 1 hereof, the

counterclaimants knew that the plaintiff, United States of America, claimed that title to the said lands was in the United States.

8. At no time did any of the defendants and counterclaimants rely upon the conduct of agents of the plaintiff, United States of America, to their detriment.

WHEREFORE, the court makes the following:

CONCLUSIONS OF LAW

A. The plaintiff, United States of America, is not estopped from asserting its right to exclusive possession of the real property which is the subject of this action.

B. Based upon the finding that the subject land was formed by accretion and not by avulsion and upon the finding

that the subject land was formed as accretion to lands owned by the plaintiff, United States of America, the plaintiff, United States of America is, and, at all times pertinent hereto, was, the sole fee owner of the subject land and thus defendants were not and are not now entitled to have title quieted in them.

C. Based upon the finding that the subject land was formed by the process of accretion, the center of the main channel of the Colorado River has, at all times pertinent herein, been the boundary between the states of Arizona and California in the vicinity of the subject land.

D. The claim of the counterclaimants to lands described as the Southwest Quarter of the Northwest

Quarter (SW 1/4 NW 1/4), Section 21, Township 1 North, Range 23 West, Gila and Salt River Base and Meridian, Yuma County, Arizona, arising out of United States Homestead patent 381486 does not give the counterclaimants any claim to right, title or interest in and to the land which is the subject of this action.

E. The plaintiff, United States of America, has not engaged in conduct amounting to laches.

F. Therefore, the counterclaims of the defendants and counterclaimants and each of them are denied in their entirety.

DATED: 1-15-77

s/Howard B. Turrentine
United States District Judge

PRESENTED BY:
TERRY J. KNOEPP
United States Attorney

s/ Michael E. Quinton
MICHAEL E. QUINTON
Assistant U. S. Attorney

(FILED)
(CLERK, U.S. DISTRICT COURT)
(SOUTHERN DISTRICT OF CALIFORNIA)
(BY DEPUTY)
(May 27, 1977)

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HONORABLE HOWARD B. TURRENTINE,
JUDGE PRESIDING

Civil - Case No. 72-277-T

UNITED STATES OF AMERICA,

Plaintiff,

v.

IVA MAY HARVEY, et al.,

Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
FOR PURPOSES OF APPEAL

VOLUME VII - Pgs. 1050-51

THE COURT: Anything further?

Counsel, I think there's no question of equal footing of State sovereign rights in this case. The United States had the property since

Hidalgo, by treaty, The only question to be decided here was whether the land was created by accretion or avulsion. Whether you have the Federal common law, or you have applied the law of the State of California, if you read the Code Section 1014 of the Civil Code, the only difference in that sense, as accretion is defined by the State in the instruction given by the Court, was that term naturally was used. And I think my instruction, whether you apply the Federal common law or whether you apply the State law, is the instruction that I gave, which was taken from BONELLI, generally speaking, with some additions, is a proper one. The case was tried by the Plaintiff on the theory of accretion. It was tried by you, gentlemen, on the theory of avulsion,

and the jury accepted the accretion theory. You don't tell the jury whether this is tried on Federal common law or whether it's on the State law, you instruct the jury on the law, and I think the instruction, as given by the Court, was proper under any theory. And the motion for a new trial, so forth, will be denied.

(FILED)
(CLERK, U.S. COURT OF APPEALS)
(March 10, 1982)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 77-2279

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

IVA MAY HARVEY, a widow, et al.,

Defendants-Appellants.

Before: KENNEDY and TANG, Circuit Judges, and LARSON* District Judge

ORDER

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

*The Honorable Earl R. Larson, United States District Judge for the District of Minnesota, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

JUDGMENT ON JURY VERDICT
X ENTERED
LODGED
RECEIVED

JANUARY 21, 1977

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY [illegible] DEPUTY

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF CALIFORNIA

CIVIL ACTION FILE NO. 72-277-T

UNITED STATES OF AMERICA	) AMENDED
	) JUDGMENT ON
vs.	) JURY VERDICT
	)
[separate judgments entered as to each defendant]	)

This action came on for trial before the Court and a jury, Honorable Howard B. Turrentine, United States District Judge, presiding and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged:

1. That the plaintiff, United States of America, have and recover of and from the defendant the possession of the premises situated in the County of Imperial, State of California, and described as Township 9 South, Range 22 East, San Bernardino Meridian, Section 9: Portions of Lots 1, 2, 5, and 6, also known as "Harvey's Fishing Hole."

2. That the Clerk of the United States District Court for the Southern District of California be and is hereby directed to issue the appropriate writ pursuant to Rule 70, Federal Rules of Civil Procedure, directing the United States Marshal to remove defendant, and those claiming by and through or under defendant from the above-described

premises, and to place plaintiff in possession of the said premises.

3. That the plaintiff, United States of America, have and recover from defendant damages in the sum of $ [varies per defendant].

4. That each party is to bear his own costs.

Dated at San Diego, California this 21st day of Janury, 1977.

William W. Luddy
Clerk of Court

APPROVED:

/s/ Howard B. Turrentine
United States District Judge

BY: /s/ Ricahrd Y. Bellman, Deputy

(F I L E D)
(CLERK, U.S. DISTRICT COURT)
(SOUTHERN DISTRICT OF CALIFORNIA)
(BY DEPUTY)
(November 23, 1976)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 72-277

UNITED STATES OF AMERICA,

vs.

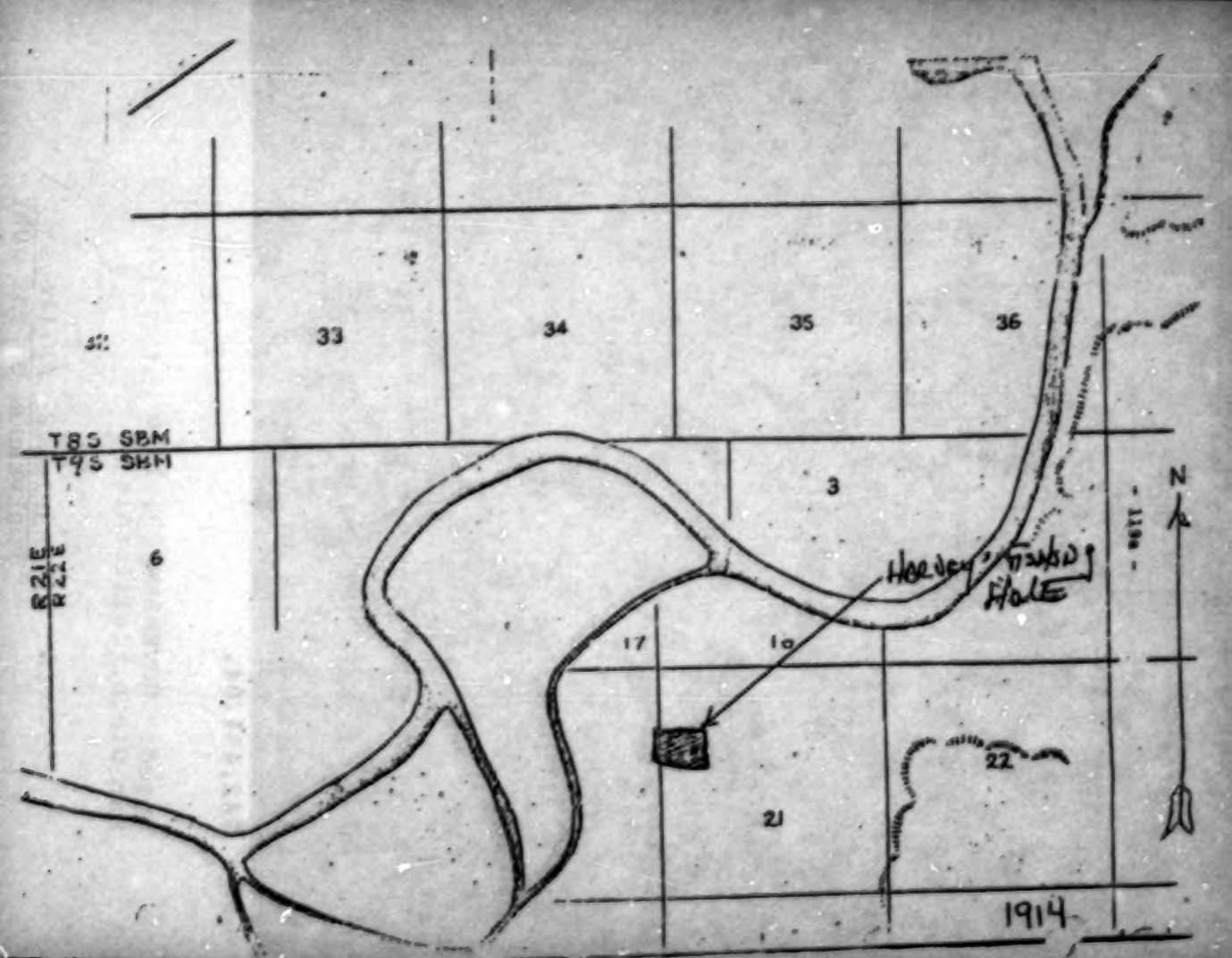
IVA MAY HARVEY, a widow, et al

V E R D I C T

We, the Jury in the above entitled matter, find in favor of the Plaintiff, United States of America, and damages are assessed in the amount of $42,451.04.

Dated: NOVEMBER 23, 1976
San Diego, California

s/ Charles E. Ballings
FOREPERSON OF THE JURY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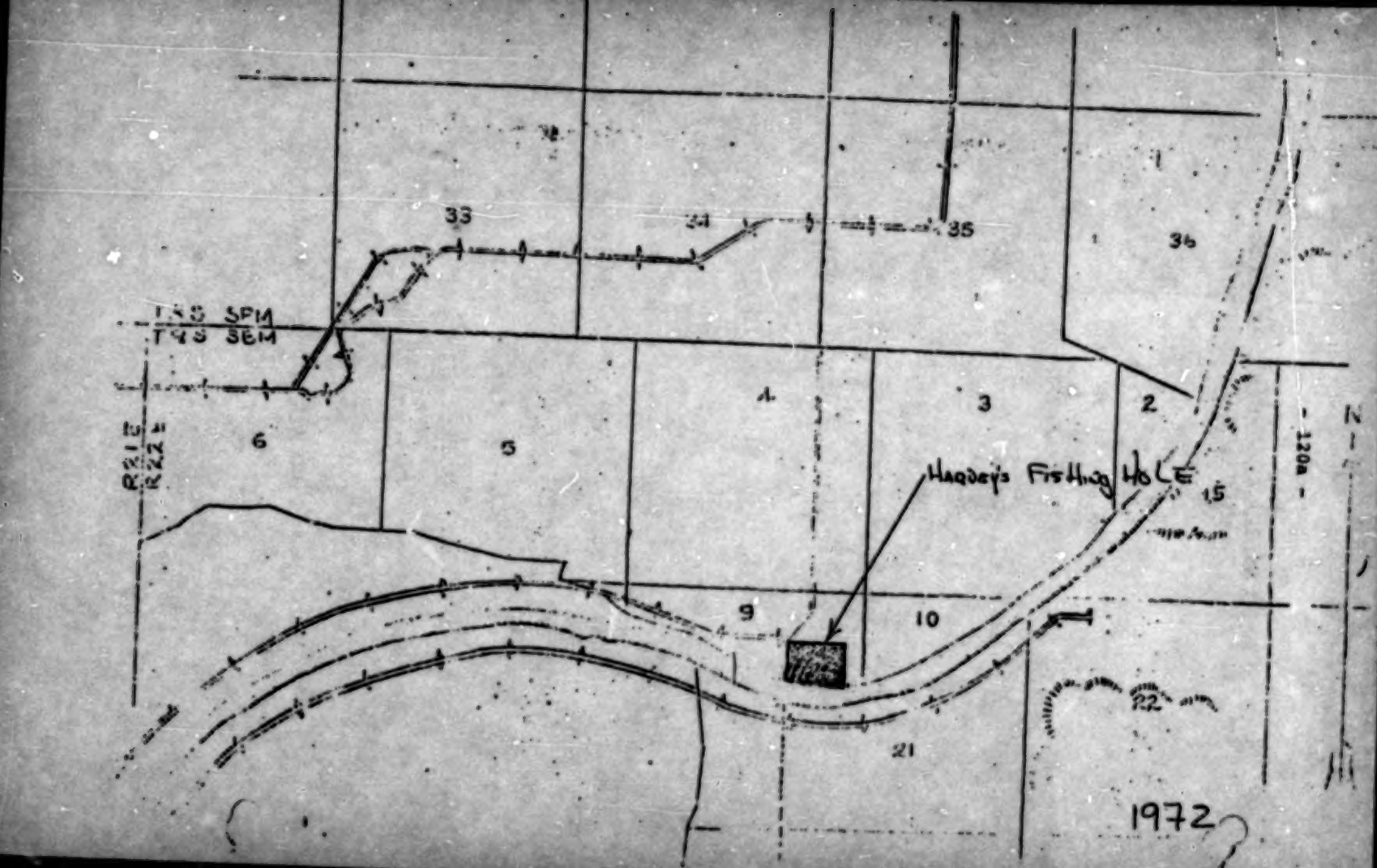
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Hardey's Fishing Hole
1972

UNITED STATES of America,
Plaintiff-Appellee,

v.

Gerald ARANSON et al.,
Defendants-Appellants.

No. 77-2295

United States Court of Appeals,
Ninth Circuit.

Argued Dec. 5, 1979.

Submitted Jan. 2, 1980.

Decided March 30, 1981.

The United States, in its capacity as trustee for Colorado River Indians, sued to quiet title to those lands situated on the California side of the present channel of the Colorado River and east of the median line of the 1919 channel. The United States District Court for the Central District of California, Manuel L. Real, J., adjudged certain lands to the property of the

United States and ordered defendants to pay damages for wrongful occupation, and defendants appealed. The Court of Appeals, Sneed, Circuit Judge, held that: (1) federal law was decisive as to whether statute creating the reservation and related executive orders conveyed title to riverbed, while state law served as rule of decision in determining effect of subsequent changes in the river's course, and (2) although construction of dam allegedly caused a change in course, California courts would not apply the "last natural channel" exception to common law of accretion. In a separate concurrence the Court, Trask, Circuit Judge, held that the Government intended to convey the eastern half of the riverbed when it

formed the reservation and, hence, boundary extended to mid-point of the 1919 abandoned westerly channel.

Affirmed.

Sneed, Circuit Judge, filed opinion dissenting from Parts III and IV of the Court's opinion.

1. Indians -- 10

Substantive rule of decision in action by United States, as trustee for Colorado River Indians, to quiet title to those lands situated on California side of the present channel of Colorado River and east of the median line of the 1919 channel, specifically, issues arising from changes in course of the River, was to be ascertained by incorporating state law to give content to the federal law which controlled the

controversy. Act March 3, 1865, 13 Stat. 541.

2. Federal Courts -- 433

Federal law determined whether statute creating Colorado River Indian Reservation and executive orders modifying or redefining the boundaries conveyed to the Indians the title to the bed of the Colorado River, i.e., the western boundary, while state law determined effect of subsequent changes in the river's course. Act March 3, 1865, 13 Stat. 541.

3. Federal Courts -- 761

Although substantive law of decision with respect to issues arising from changes in course of Colorado River and its effect on boundary of Colorado River Indian Reservation was to be ascertained

by incorporating state law to give content to federal law, such did not require reversal of district court judgment based entirely on federal law if no different result would be had under the proper standard, as a proper judgment, though based on the wrong grounds, should nonetheless be affirmed. Act March 3, 1865, 13 Stat. 541.

4. Navigable Waters -- 44(1)

Where land in dispute in quiet title action involving westerly boundary of Coloardo River Indian Reservation was presently within the state of California, California, rather than Arizona, law furnished rule of decision as to effect to changes of courses of the Colorado river, one of the Reservation boundaries, and such result

was not changed by Arizona-California Boundary Pact of 1966, which dictated no choice of law as regards land titles, and for purposes of preservation of pact's rights provision the lands were part of California before adoption of pact and, also, Indian claims would not be prejudiced by application of California law. Act March 3, 1865, 13 Stat. 541; Act August 11, 1966, 80 Stat. 340; West's Ann.Cal.Gov.Code, § 175; West's Ann.Cal.Water Code App. §§ 33-2, 33-28; A.R.S. § 41-522.

5. Common Law -- 11

California courts are required to follow common-law rules unless those rules conflict with state law or the Federal Constitution. West's Ann.Cal.Civ.Code, § 22.2

6. Navigable Waters -- 44(3)

Under the federal and common-law rule, land formed by a process of accretion, or gradual deposition of soil on the shore of an upland bounded by water belongs to the upland owner and, hence, if a river forming the boundary between property of two upland owners changes its course by a gradual process of erosion from one bank and accretion to the other, the boundary moves with the river, while sudden or "avulsive" changes in a river's course do not alter the boundaries, which remain in the abandoned riverbed.

7. Navigable Waters -- 44(1)

California courts have expressed approval of the common-law doctrine of accretion; however, a limited exception

exists in that a distinction is made between accretion which is naturally caused and accretion which results from artificial causes, such as man-made dams or other structures which may obstruct the natural movements of a body of water, i.e., a "last natural channel" rule. West's Ann.Cal.Civ.Code, § 22.2; West's Ann.Cal.Const. Art. 15, § 3 (Repealed).

8. Navigable Waters -- 44(3)

California's "last natural channel" exception to common-law rule of accretion was not applicable to dispute as to boundary of Colorado River Indian Reservation in Palo Verde Valley, notwithstanding completion in 1909 of the Laguna Dam downstream of disputed tract, as such exception applies only to state

sovereign lands. Act March 3, 1865, 13 Stat. 541; West's Ann.Cal.Civ.Code, § 22.2; West's Ann.Cal.Const. Art. 15, § 3 (Repealed).

9. Navigable Waters -- 44(1)

California's "last natural channel" exception to common-law rule of accretion appears to be based, first, on the state's control over obstructions erected in waterways and, second, on the statutory or constitutional inalienability of particular state lands, especially tidelands and such exception, created to protect sovereign lands of the state, is not to be extended to private landowners. West's Ann.Cal.Civ.Code, § 22.2; West's Ann.Cal.Const. Art. 15, § 3 (Repealed).

10. Judgment -- 747(5)

Where California did not claim title to 1908 bed of Colorado River in Palo Verde Valley but claimed westerly half of abandoned course followed by river before the Olive Lake Cut in 1920, with westward movement of channel prior to construction of the cut allegedly caused by 1909 construction Laguna Dam, and such claim was approved by district court in Government's action to quiet title on behalf of reservation Indians to land on California side of present channel and east of median line of 1919 channel and California did not appeal, the judgment was res judicata and, hence, occupants of subject tract could not invoke California's artificial accretion exception to common-law rule

of accretion, i.e., that California retained title to 1908 channel with result that reservation could not expand westward. Act March 3, 1865, 13 Stat. 541; West's Ann.Cal.Civ.Code, § 22.2; West's Ann.Cal.Const. Art. 15, § 3 (Repealed).

11. Indians -- 12

In determining whether executive orders establishing the Colorado River Indian Reservation conveyed to the Indians title to the easterly half of the bed of the Colorado River and, therefore, title to lands east of the median line of the abandoned westerly channel the court was required to resolve all ambiguities in favor of the Indians. Act March 3, 1865, 13 Stat. 541.

12. Indians -- 12

The extent to which Indian tribe was displaced, or the degree to which a treaty speaks of establishing a permanent location for a reservation, has no direct bearing per se on whether the government intended to convey the riverbed in any particular reservation case where one of the boundaries is a river. Act march 3, 1865, 13 Stat. 541.

13. Indians -- 12

Executive orders establishing Colorado River Indian Reservation conveyed title to easterly half of the bed of the Colorado River and, therefore, title to lands east of the median line of the abandoned westerly channel where although 1873 order established the western boundary only

vaguely, i.e., "bounded on the west of the Colorado River," order of May 15, 1876 established metes and bounds of the entire reservation referring to "west" of the river, notwithstanding that the Government did not own the western half of the river at time the reservation was created, in that such half had passed to California under the equalfooting doctrine. Act March 3, 1865, 13 Stat. 541.

14. United States -- 58(1)

Conveyances by the United States during a state's territorial period are not lightly to be inferred; however, it was within the power of the United States to make such conveyances if it so desired.

Appeal from the United States

District Court for the Central District of California.

Before TRASK and SNEED, Circuit Judges, and EAST,* District Judge.

SNEED, Circuit Judge:

The proper resolution of this appeal has proved as difficult to divine as determining the course of the Colorado River in the Palo Verde Valley during the period of time with which this case is concerned. Both have proved elusive, and, even now, some doubt with respect to both remains. The appeal is from the decision of the district court adjudging certain lands in what is referred to as the Olive Lake region of the Palo Verde Valley to be the property of the United States, acting as trustee for the Colorado River

Indians, and ordering appellants to pay damages because of their wrongful occupation of those lands. Appellants maintain that the district court should have granted their motion for a new trial because of a change in the applicable law. Appellants also contend that the district court erred in concluding that the Colorado River Indian Reservation included the easterly half of the bed of the Colorado River. We affirm.

I

In 1865, Congress created the Colorado River Indian Reservation by setting apart certain lands within what was then the Territory of Arizona. Act of Mar. 3, 1865, ch. 127, 13 Stat. 541, 559. The boundaries of the Reservation were modified or redefined by executive

orders issued on November 22, 1873; November 16, 1874; May 15, 1876; and November 22, 1915. See Executive Orders Relating to Indian Reservations, 1855-1922, pt. I, at 6, 7; pt. II, at 5, 6 (1975).

The Reservation extended westward to, and in some places beyond, the Colorado River, which formed the boundary between California and Arizona. The river, however, did not maintain a constant course. Over the years it carved out various channels through the Palo Verde Valley. Three of those channels are critical to this case. For our purposes, the 1908 channel refers to the course followed by the river before the completion in 1909 of the Laguna Dam, which is located

downstream from the Palo Verde Valley. It appears in Appendix A to this opinion. In the decade following completion of the dam, the river moved gradually westward, as soil was eroded from the California bank and deposited on the Arizona side. By 1915 its location was as depicted by Appendix B, and by 1919 the course of the river had formed a bend or loop known as the "Olive Lake Bend" which Appendices C and D reflect. We shall refer to the river's course at this time as the 1919 channel. In 1920, the Palo Verde Mutual Water Company, with the authorization of the United States Department of the Interior, constructed a cut-off channel across the neck of this bend. Appendix E shows the location of the cut-off as

proposed. By 1921, the entire river had moved into this cut-off channel, described as the Olive Lake Cut, and was following a course to the east of both the 1908 channel and the westerly, 1919 channel. We shall refer to this last course as the 1921 channel. The record contains no drawing of the 1921 channel although Appendix F fixes the channel as of April 1925 somewhat east of the present course of the river. Obviously the 1921 channel was also east of the present river.[1/]

Uncertainty over the shifting state border led California and Arizona to fix the line in a Boundary Pact which was approved by Congress in 1966. Act of Aug. 11, 1966, Pub.L.No.89-531, 80 Stat. 340. The Pact did not affect property

claims or titles, and the states' ratifying statutes provided that titles, rights, or claims would not be prejudiced by the Pact's designation of the state boundary line. 1963 Ariz.Sess.Laws ch. 77, § 5, reprinted in annotation to Ariz.Rev.Stat. Ann. § 41-522 (West 1974); 1963 Cal. Stats. ch. 859, § 4, reprinted in annotation to Cal.Gov't Code § 175 (West 1980).

On July 17, 1972, the United States in its capacity as trustee for the Indians commenced this action seeking to quiet title to those lands situated on the California side of the present channel and east of the median line of the 1919 channel. Various individuals and corporations, as well as the Palo Verde Irrigation District and the State

of California, were named as defendants. The private defendants had acquired lands in the Olive Lake Region, apparently from previous occupants, some years after the construction of the Olive Lake Cut but before the adoption of the Arizona-California Boundary Pact. The Palo Verde Irrigation District, a public district of the State of California, claims lands in the Olive Lake region and regulates water usage in the vicinity. The Indians contended, however, that the Colorado River Indian Reservation extended to the median line of the 1919 channel and that, because the Olive Lake Cut had effected an avulsive change in the course of the river, their title to this land was never lost. They therefore asked that

the defendants be required to remove themselves and their personal belongings from the land and to pay damages for wrongful possession.

At trial, the dispute focused on the issue of whether the change in the river's course from the 1919 channel to the 1921 channel was the result of avulsion or accretion. The district court found that the change had been avulsive and concluded that title to the lands had remained in the Indians. The district court also found that the Reservation included the eastern half of the bed of the river. Thus, the court held that the Indians presently hold title to the lands east of the median line of the 1919 channel, and that the State of California owns the bed west of

that median line. The court also ordered the defendants, except the State of California, to pay damages for wrongful possession.

Although the district court announced its decision on November 17, 1976, the court's findings of fact, conclusions of law, and judgment were not filed until February 11, 1977. In the intervening period, the Supreme Court rendered its decision in Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363, 97 S.Ct. 582, 50 L.Ed.2d 550 (1977), in which the Court overruled its previous decision in Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 94 S.Ct. 517, 38 L.Ed.2d 526 (1973). Arguing that the district court had relied on federal law

and that under Corvallis the case should be resolved under state rather than federal law, the defendants, except the State of California, moved for a new trial. The motion was denied, and defendants, again save for the State of California appealed.

Appellants raise two issues. They contend that the property dispute is governed by California law, not federal law. Under California law, in appellants' view, the Indians would not have obtained title to any accretions which were artificially caused. Hence, appellants request a new trial in order to prove that the lands in question were deposited on the Arizona side of the river as a result of artificial accretions caused by the construction of the

Laguna Dam in 1909. Appellants also contend that the Indian Reservation did not include the eastern half of the riverbed and that the district court's determination of the Reservation's western boundary was thus incorrect. We shall address these issues separately.

II

In Bonelli Cattle Co. v. Arizona, supra, the Supreme Court held that a dispute between a private claimant and the State of Arizona over title to land within the abandoned bed of the Colorado River was governed by federal law. Consistent with Bonelli, the district court decided this case on the basis of federal law. The overruling of Bonelli by Corvallis enables the appellants to argue that this case must be decided

according to state, not federal law, and that the district court should thus have granted their motion for a new trial. The appellee contends that Corvallis is inapplicable here because, unlike the Willamette River, which was the source of the controversy in Corvallis, the Colorado River until 1966 formed the boundary between two states.

[1-3] We believe this dispute concerning the proper application of Corvallis was resolved by the Supreme Court's recent decision in Wilson v. Omaha Indian Tribe, 442 U.S. 653, 99 S.Ct. 2529, 61 L.Ed.2d 153 (1979). The claimant in Wilson was a tribe of Indians whose reservation, located in Nebraska, was bounded on the east by the Missouri River. Prior to a compact made

in 1943, the river had also marked the state boundary between Nebraska and Iowa. The tribe claimed lands that had once been part of the reservation but which, due to changes in the river's course, had passed to the Iowa side of the river. The Supreme Court held that the Indians' claim was governed by federal law but that state law should be adopted as the rule of decision. Id. at 669-76, 99 S.Ct. at 2539-42. This holding governs this case. It follows that the substantive rule of decision in this case with respect to issues arising from changes in the course of the Colorado River must be ascertained by incorporating state law to give content to the federal law which controls this controversy.[2/] This conclusion,

however, does not require reversal of the judgment of the district court if its application leads to no different result. A proper judgment, though based on the wrong grounds, should nonetheless be affirmed. United States v. Best, 573 F.2d 1095, 1100-01 (9th Cir. 1978).

[4] To ascertain whether state law would alter the result reached below we must determine which state's law should provide the rule of decision. The appellants assert that California law governs, while the appellee maintains that, assuming state law is to be employed, it must be that of Arizona. We agree with the appellants. The land in dispute presently is within the State of California. That is controlling unless the Arizona-California Boundary

Pact dictates a different conclusion. The Pact itself dictates no choice as to what law shall govern disputes over land titles. However, in ratifying the Pact, each state adopted a "preservation of rights" provision, which declared:

> Nothing contained in the provisions of this act ... shall prejudice the titles, rights or claims of any person, public or private, natural or artificial, to any of the lands herein involved whether such titles, rights, or claims arise or exist upon the basis that the lands affected by the designation of boundary as set forth in the compact and in this act were previously a part of the State of Arizona and have now become a part of the State of California, or were previously a part of the State of California and have now become a part of the State of Arizona or otherwise;. . .

1963 Ariz.Sess.Laws ch. 77, § 5, reprinted in annotation to Ariz.Rev. Stat.Ann. § 41-522 (West 1974); 1963

Cal.Stats. ch. 859, § 4, reprinted in annotation to Cal.Gov't Code § 175 (West 1980). This provision, as we read it, alters the normal assumption that property located in California is subject to California law only if the lands in dispute were part of Arizona before the adoption of the Pact and if the Indians' claims would be prejudiced by the application of California law. Neither condition exists, however.

The record, as demonstrated by Appendix F, supports appellants' contention that these lands were part of California, not Arizona, before the adoption of the Pact. Appellants, who claim title under the laws of California, have been in possession of the land since well before the Pact; indeed, their possession of the lands is not only conceded

but is the basis of the claim for damages against them. In addition, one of the appellants, the Palo Verde Irrigation District, is a public district organized under the laws of California. The District, which was created by statute in 1923, Cal.Water Code. App. § 33-2 (West 1968), has authority over water usage in the Palo Verde Valley; the District is empowered to levy taxes for this purpose, id. § 33-28, and holds liens for unpaid taxes and water tolls on the lands in issue, id. § 33-28f. See Clerk's Record, vol. I., at 26. In view of these facts, it is clear that the area was within the jurisdiction of California prior to adoption of the Boundary Pact.[3/]

Moreover, the claim of the Indians is not prejudiced by application of

California law. Although Arizona case law relevant to this issue is scant, the leading case, State v. Bonelli Cattle Co., 107 Ariz. 465, 469, 489 P.2d 699 (1971), rev'd on other grounds, 414 U.S. 313, 94 S.Ct. 517, 38 L.Ed.2d 526 (1973), cites the California law on artificial accretion with approval. Because our resolution of the relevant issue employs the same law, it is unlikely that application of Arizona law would alter our result. Thus, our choice of law does not prejudice the Indians.

Having concluded that the law of California should be adopted as the federal rule of decision in this case, we now must decide whether a new trial is necessary. Our approach is first to review the content of the applicable

federal common law, then to examine California law to determine whether it differs and, if so, whether that difference requires a new trial.

[5] In examining California law, we shall be mindful that California courts are required by statute to follow common law rules unless those rules conflict with state law or the federal constitution. Cal.Civ.Code § 22.2 (West 1954).

[6] Under the federal and common law rule, land formed by a process of accretion, or gradual deposition of soil upon the shore of an upland bounded by water, belongs to the upland owner. Hence, if a river forming the boundary between the property of two upland owners changes its course by a gradual process of erosion from one bank and

accretion to the other, the boundary moves with the river. However, sudden or "avulsive" changes in a river's course do not alter the boundaries, which remain in the abandoned riverbed. See County of St. Clair v. Lovingston, 90 U.S. (23 Wall.) 46, 23 L.Ed. 59 (1874); 5A Thompson on Real Property §§ 2560, 2561 (repl. 1978).

The district court in this case applied federal law and concluded that as the Colorado River moved slowly westward between 1909 and 1920, the western boundary of the Reservation moved with it. However, the Olive Lake Cut, which diverted the river eastward to its 1921 channel, effected an avulsive change and thus left the Reservation's boundary unaltered. The boundary thus remained at the abandoned westerly channel.

Appellants do not deny that the district court's judgment is correct as a matter of federal law. As indicated above, the common law does not differ.

[7] California courts have expressed approval of the common law doctrine of accretion. See, e.g., Forgeus v. County of Santa Cruz, 24 Cal.App. 193, 199-200, 140 P. 1092 (1914). However, certain California cases have created a limited exception to the common law rules by distinguishing between accretion which is naturally caused and accretion which results from artificial causes, such as manmade dams or other structures which may obstruct the natural movements of a body of water. It is this exception to which appellants pin their hopes. They maintain that these cases establish a "last

natural channel" rule under which artificially caused accretion leaves property boundaries unchanged. A new trial is necessary, they assert, to enable them to prove that the river's westward movement before 1920 was artifically caused by the construction of the Laguna Dam in 1909. From this it would follow, the appellants continue, that the western boundary of the Reservation should thus be determined not by the river's westerly, 1919 channel, as the district court held, but rather by the 1908 channel which the river followed before the closure of the dam.

[8] We do not believe that California courts would apply the "last natural channel" rule to the facts of this case. The State of

California so asserts in an amicus curiae brief which points out that California's exception for artificial accretions applies only to state sovereign lands. Our review of the California decisions from which the artificial accretion exception is derived convinces us that the State of California's position is correct. California courts have consistently viewed the exception as a doctrine designed to protect state sovereign lands. Thus, in Carpenter v. City of Santa Monica, 63 Cal.App.2d 772, 787, 147 P.2d 964 (1944), the court stated:

> There are no doubt many federal cases, following the leading case of County of St. Clair v. Lovingston, 23 Wall. (90 U.S.) 46 [23 L.Ed. 59], relied upon by appellant, which hold that as between competing upland owners, or as between upland

> owners and others not claiming tidelands as successors of the state, artificial accretions belong to the upland owner. This is the general common law rule and probably the rule in this state. (Forgeus v. County of Santa Cruz, 24 Cal. App. 193 [140 P. 1092].) An entirely different rule may apply, however, where the upland owner attempts to assert title to lands formed by artificial accretions against the claim of the state, or its successor in interest, that such lands are tidelands....
>
> When the California cases are considered there can be no reasonable doubt but that the rule in this state is that in a controversy between the state, or its grantees, and the upland owner, artificial accretions belong to the state....

Later, in People v. Hecker, 179 Cal.App. 2d 823, 837, 4 Cal.Rptr. 334 (1960), the court declared:

> Relying upon the federal and common-law rule that accretion accrues to the upland owner even though assisted by artificial means, appellant

> submits that under section 22.2, Civil Code, it shall be the rule of decision in California courts. The law of this state does not support such a position. The within controversy is between the littoral owner and the state, and as such the rule urged by appellant does not apply.

(Emphasis added.) These pronouncements indicate that the artificial accretion doctrine is a narrow exception intended only to protect the state's title to its sovereign lands.[4/]

This interpretation is consistent with the reasons which underline the artificial accretion exception. Although the purposes of the exception are admittedly obscure, two reasons for distinguishing between natural and artificial accretion are discernible. The first is reflected by the earliest case to distinguish between artificial and natural accretion, Dana v. Jackson Street Wharf

Co., 31 Cal. 118 (1866), which emphasized that since upland owners have no right to create obstructions to the natural flow of waterways, such obstructions therefore are within the control of the state. "By the common law any erection below high water mark, without license, is regarded as an encroachment and intrusion on the King's soil, which the King may demolish, seize or arrent at his pleasure." Id. at 120. The court then appears to have reasoned that since in [sic] artificial obstruction in a body of water is in a sense within the state's control, the state may also claim any accretion caused by such an obstruction. Thus, in Forgeus v. County of Santa Cruz, supra, 24 Cal.App. at 200, 140 P. 1092, after upholding the claim of an upland owner to accretions allegedly caused

by the construction on the owner's land of a county roadway, the court added: "Clearly, there is a distinction between this case and that where a structure is erected, by the state or municipality, on land below the line of ordinary high water. In the latter case the deposit of alluvion caused by such structure would not inure to the benefit of the riparian owner."

A more important reason for the artificial accretion exception was also suggested in Dana. The court, observing that the boundaries of the San Francisco waterfront upon which the plaintiff's property was situated were statutorily defined, concluded that to permit a landowner to acquire artificial accretions would alter waterfront boundaries in contravention of that statute. Dana,

supra, 31 Cal. at 121. Similarly, cases which have denied the claims of upland owners to land formed by artificially caused deposits upon a seashore appear to be based on a provision of the California Constitution which forbids alienation of tidelands located within two miles of an incorporated city or town. Cal.Const. art. 15, § 3 (repealed 1976; current version at art. 10, § 3). Thus, in Patton v. City of Los Angeles, 169 Cal. 521, 525, 147 P. 141 (1915), the California Supreme Court declared that tideland which had been filled in by accretion

> was once tideland, and ... this being so, it was reserved from sale, and was not alienable by any state officer under any law, ... and, therefore, no artificial embankment, made by third persons, or made or suffered by state

> officers or agents, nor any accretion to the adjacent upland caused thereby, could operate to divest the state of its title to the tideland so reserved.

The court did not explain why its reasoning would not be equally applicable to instances of natural accretion. Possibly it is because artificial accretion more resembles the intentional alienation of state lands, which the California Constitution forbids, than does the process of natural accretion. In any event, nearly all the artificial accretion cases involved tidelands.

[9] Hence, we conclude that California's artificial accretion exception appears to be based, first, on the state's control over obstructions erected in waterways and, second,

on the statutory or constitutional inalienability of particular state lands, especially tidelands. It was created to protect the sovereign lands of the state. This purpose indicates that the exception need not be extended to private landowners. Support for this view is provided by the fact that the exception has never been applied directly to benefit a landowner other than the state or its assignee.

The case most helpful to appellants is People ex rel. Department of Public Works v. Shasta Pipe & Supply Co., 264 Cal.App.2d 520, 70 Cal.Rptr. 618 (1968). The controversy in that case was caused by the movement of the Feather River, which in the disputed area ran from east to west. Because of mining and dredging operations, the river's course had moved

southward in the century before 1960, and when the state acted in 1961 to condemn lands in the area, the owner of the land to the north of the original channel claimed title to the lands lying between the old and new channels under the doctrines of accretion, adverse possession, and occupancy. After this claim was rejected in the superior court, the court of appeals remanded for trial on the issues of adverse possession and occupancy but apparently agreed that the landowner could not claim the lands in question on the basis of accretion. Though the opinion discusses the accretion doctrine only briefly, the court seems to have reasoned that because the change in the river's course was caused by human interference, the state had retained title to the original bed

rather than acquiring title to the new bed. Id. at 535. The property of the upland owner on the north, therefore, could not be extended southward by accretion because it was blocked on the south by a strip of land, the river's abandoned bed, which belonged to the state. As a consequence, perhaps the owner of land lying south of the original bed was an incidental beneficiary of the artificial accretion doctrine. By preserving the state's title to the abandoned bed, owners south of the original bed may have had their property preserved against an accretion loss.

[10] Using this reasoning, appellants argue that if the westward movement of the Colorado River prior to construction of the Olive Lake Cut

was caused by the erection of the Laguna Dam in 1909, then California retained title to the 1908 channel with the result that the Reservation could not expand westward. The difficulty that the appellants encounter is that California has not claimed title to the 1908 bed. Rather, it has claimed the westerly half of the abandoned course followed by the river before the Olive Lake Cut was made in 1920. Moreover, this claim has been approved by the district court.[5/] California has not appealed from the district court's judgment; it is res judicata and unreviewable by us. International Manufacturing Co. v. Landon, Inc., 327 F.2d 824 (9th Cir. 1964). Hence, appellants cannot assert that their

property boundaries were fixed by a protective barrier of state land.[6/]

We conclude that appellants cannot invoke California's artificial accretion exception. It follows that the California rule of decision would thus be identical to the federal law doctrine applied by the district court. Therefore, the change in applicable law effected by the Supreme Court's decisions in Corvallis and Wilson would not alter the outcome in this case. The district court properly denied appellants' motion for a new trial.

III

TRASK, Circuit Judge (with whom EAST, District Judge, concurs):

[11-13] Appellants challenge the district court's determination that the excutive orders which established the

Reservation conveyed to the Indians title to the easterly half of the bed of the Colorado River, and, therefore, title to lands east of the median line of the abandoned westerly channel. Here, as in Choctaw Nation v. Oklahoma, 397 U.S. 620, 90 S.Ct. 1328, 25 L.Ed.2d 615 (1970), "the question is whether the United States intended to convey title to the riverbed to [the Indians]." Id. at 633, 90 S.Ct. at 1335.[7/] In ascertaining such intent, this court must resolve all ambiguities in the orders in favor of the Indians. See, e.g., Squire v. Capoeman, 351 U.S. 1, 6-7, 76 S.Ct. 611, 614-615, 100 L.Ed. 883 (1956) (quoting Carpenter v. Shaw, 280 U.S. 363, 367, 50 S.Ct. 121, 122, 74 L.Ed. 478 (1930); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582, 8 L.Ed. 483

(1832)); Navajo Tribal Utility Authority v. Arizona Dept. of Revenue, 608 F.2d 1228, 1233 (9th Cir. 1979). As the Supreme Court has stated:

> The construction [of laws governing the Indians], instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years.

Choate v. Trapp, 224 U.S. 665, 675, 32 S.Ct. 565, 569, 56 L.Ed. 941 (1912), quoted with approval in Antoine v. Washington, 420 U.S. 194, 212, 95 S.Ct. 944, 954, 43 L.Ed.2d 129 (1975)(Douglas, J., concurring). See also Haley v. Seaton, 281 F.2d 620, 623 (D.C.Cir. 1960); 1 American Indian Policy Review

Comm'n, Final Report 109-11 (1977). Applying this rule of construction to the executive orders establishing and defining the Reservation, especially the order of May 15, 1876, we conclude that the federal government intended to convey the eastern half of the Colorado River bed to the Indians as part of the Reservation.

The first executive order delineating the bounds of the Reservation, that of 1873, appears ambiguous. It established the western boundary of the Reservation only vaguely--"bounded on the west by the Colorado River."[8/] Resolution of this ambiguity, if indeed there is one,[9/] in favor of the Indians results in their receiving title to the eastern half of the riverbed by

virtue of this order alone. Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 80-83, 86-87, 43 S.Ct. 60, 61-62, 63-64, 67 L.Ed. 140 (1922). Nevertheless, the order of May 15, 1876, also indicates the government's intent to convey the eastern half of the riverbed. In establishing the metes and bounds of the entire Reservation, this order set as part of the western boundary "a direct line toward the place of beginning to the west bank of the Colorado River; thence down said west bank to a point opposite the place of beginning; thence to the place of beginning." (Emphasis added.) Although the government did not own the western half of the riverbed at the time the Reservation was created

(that half having already passed to California under the equal-footing doctrine), it is surely a fair inference that in the uncertain legal-boundary atmosphere of the time the government believed that establishing the boundary at the west bank would operate to convey that portion of the bed to which it still had title.[10/]

That the government intended to convey the riverbed is further supported by the circumstance of the Indians' dependence on the river. In determining whether the government intended that the bed of a body of water be contained within an Indian reservation, courts have frequently examined the history and lifestyle of the reservation tribes. For example, in Alaska Pacific Fisheries v. United States, 248

U.S. 78, 39 S.Ct. 40, 63 L.Ed. 138 (1918), the Supreme Court concluded that an Indian reservation established as "the body of lands known as Annette Islands" included the adjacent waters and submerged lands as well as the upland islands. Id. at 89, 39 S.Ct. at 41. The Court based this conclusion upon its determination that the Indians of the reservation could not have sustained themselves on the upland alone. Id. In Skokomish Indian Tribe v. France, 320 F.2d 205 (9th Cir. 1963), cert. denied, 376 U.S. 943, 84 S.Ct. 797, 11 L.Ed.2d 767 (1964), this court affirmed findings of the district court which examined the Indian's lifestyle and concluded that the tidelands adjacent to the reservation were not intended as part of the reservation. Id. at 210. Because the Indian

lifestyle was oriented toward river fishing, the ocean waters were not a necessry food source. Id. at 210-12. See also United States v. Holt State Bank, 270 U.S. 49, 58-59, 46 S.Ct. 197, 200, 70 L.Ed. 465 (1926); United States v. Finch, 548 F.2d 822, 832 (9th Cir. 1976), vacated on other grounds, 433 U.S. 676, 97 S.Ct. 2909, 53 L.Ed.2d 1048 (1977); Moore v. United States, 157 F.2d 760, 762-64 (9th Cir. 1946), cert. denied, 330 U.S. 827, 67 S.Ct. 867, 91 L.Ed. 1277 (1947). In United States v. Finch, supra, this court noted that "[those cases in which] an examination of the lifestyles of the Indian tribes was considered particularly important, involved controversies over the location of the exterior boundaries of lands set aside for the Indians." 548 F.2d at 832

n.19. This is precisely the situation in the case at hand. Examintion of the history and lifestyle of the Mohave Indians, the principal tribe on the Reservation, suggests that the government intended to convey the riverbed as part of the Reservation. At the time the Reservation was created, Congress was aware that the Mohaves were heavily dependent upon the Colorado River; having been restricted to their reservation and cut off from traditional hunting grounds, the Indians risked frequent famine without the ability to divert the river and alter its course for irrigation purposes. See 5 House Ex.Doc. No. 1, 38th Cong., 2d Sess. 300-301 (1865); Senate Misc.Doc. No. 79, 37th Cong., 2d Sess. 12-14 (1862). See also Cong. Globe, 38th Cong. 2d Sess.

1320-22 (1865)(remarks of Arizona Territorial Representative Poston). More telling, however, is a Memorial of the Legislature of Arizona, House Misc. Doc. No. 16, 38th Cong., 2d Sess. (1865) (resolution passed by Arizona Territorial Legislature), which was presented to Congress, see Cong. Globe, supra, at 1320, and which states in part: "[T]he late superintendent of Indian affairs of the Territory, Honorable Charles D. Poston, in view of [the Colorado River Indian Tribes'] scattered and destitute condition, selected and caused to be laid off, on the east bank and bottom of the Colorado river a reservation...." (Emphasis added.) This language clearly suggests that the Territorial Legislature understood the Reservation to include the riverbed.[11/] Construing these documents in

favor of the Indians, we find it probable that those involved with the establishment of the Colorado River Indian Reservation understood it to include the riverbed.

Finally, support for our conclusion that Congress intended to convey the riverbed is suggested by language in Choctaw Nation, supra: "[T]he United States seems to have had no present interest in retaining title to the riverbed at all; it had all it was concerned with in its navigational easement via the constitutional power over commerce." 397 U.S. at 635, 90 S.Ct. at 1336. Similarly, in this case, a holding that the United States did not intend to convey the riverbed to itself in trust for the Reservation would mean that, at the time the Reservation was formed,

California owned the land on one side of the river, and the west half of the riverbed, the Reservation owned the land on the other side of the river, and the government owned the narrow strip of riverbed between the two. Such ownership would have served no governmental interest existing at the time of the conveyance.

We do not view United States v. Holt State Bank, 270 U.S. 49, 46 S.Ct. 197, 70 L.Ed. 465 (1926), as controlling authority[12/] in this case, as urged by appellants and argued by the dissent. In Holt State Bank, as in this case, the Indian's title was merely aboriginal, not in fee simple as the title was in Choctaw Nation. In Holt State Bank, however, the Court refused to find government intent to convey to

the Indians the bed of an interior lake primarily because there was never a treaty, executive order, or any other document establishing the Indian reservation from which such intent could have been inferred. 270 U.S. at 58-59, 46 S.Ct. at 200. The reservation was merely that which was left over after the government, by treaty and other action, appropriated the surrounding lands. Consequently, the only possible basis for Indian ownership of the reservation was aboriginal title, Id. In Choctaw Nation, on the other hand, the Indians were moved from their aboriginal lands to a new location, where the treaty conveyed the land to them in fee simple. 397 U.S. at 622-26, 90 S.Ct. at 1330-32. In a concurring opinion, Justice Douglas contrasts this basis of ownership with

that of the tribes in Holt State Bank, in order to distinguish Choctaw Nation from the former decision. 397 U.S. at 638-39, 90 S.Ct. at 1338 (Douglas, J., concurring).

The present case can likewise be distinguished from Holt State Bank. The Indian tribes of the Colorado River Indian Reservation (predominately the Mohaves) had been citizens of Mexico, from which nation the United States obtained the lands in question. As prior Mexican citizens, the Indians were deemed not to have any aboriginal title; thus, no treaties ceding such title to the government would have been recognized. See Cong. Globe, 38th Cong., 2d Sess. 1320 (1865). The bases for Indian title to the Reservation are the executive orders establishing the

Reservation in trust for the tribes and the more recent Act of Congress fixing beneficial ownership of the Reservation in the Tribes, see Act of April 30, 1964, Pub.L.No.88-302, 78 Stat. 188. In this case, therefore, unlike Holt State Bank, there exist affirmative governmental acts from which intention to grant the bed of the Colorado River can reasonably be inferred.

IV

[14] Although it is true that conveyances by the United States during a state's territorial period are not lightly to be inferred, United States v. Holt State Bank, 270 U.S. 49, 55, 46 S.Ct. 197, 199, 70 L.Ed. 465 (1926), it is nevertheless within the power of the United States to make such conveyances if it so desires, Shively v.

Bowlby, 152 U.S. 1, 48, 14 S.Ct. 548, 566, 38 L.Ed. 331 (1894). We find the evidence in this case sufficient to enable us to conclude that the government intended to convey the eastern half of the riverbed to the Indians when it formed the Reservation. Accordingly, we hold that the boundary of the Reservation extends to the midpoint of the 1919 abandoned westerly channel of the Colorado River, and that the eastern half of the river bed was conveyed by the government to the Indians as part of the Reservation.

The judgment of the district court is affirmed.

SNEED, Circuit Judge, dissenting from Parts III and IV of the court's opinion:

I respectfully dissent from Parts III and IV of this opinion and would hold that the pertinent statute and executive orders did not convey to the Indians title to the easterly half of the bed of the Colorado River.

A. Intent of the 1876 Executive Order

My starting point is that a grant establishing an Indian reservation does not always impart title to the bed of boundary rivers or even to bodies of water that are wholly within the reservation. United States v. Holt State Bank, 270 U.S. 49, 46 S.Ct. 197, 70 L.Ed. 465 (1926). To determine the scope of the grant one should determine whether Congress and the President, in establishing the Reservation, manifested a

definite intention to convey title to the riverbed.

The requirement of a definite intention to transfer title to the bed derives from long-established principles of law with respect to navigable waters in territories of the United States. Early in our history, the Supreme Court declared that the United States holds such waters in trust for the future states and that under the "equal footing" doctrine a state acquires title to the beds of such waters upon entering the Union. Pollard's Lessee v. Hagen, 44 U.S. (3 How.) 212, 221-22, 11 L.Ed. 565 (1845). Although Congress may make grants of the lands underlying navigable waters in the territories, it has generally not done so:

> The Congress of the United States, in disposing of the

> public lands, has constantly acted upon the theory that ... the navigable waters and the soils under them ... shall not be granted away during the period of territorial government; but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future states ....

Shively v. Bowlby, 152 U.S. 1, 49-50, 14 S.Ct. 548, 566, 38 L.Ed. 331 (1894).

In Holt Bank, supra, the Supreme Court applied these principles to the Chippewa Indians' claim to the bed of a drained lake. From its earlier decisions, the Court declared, "[i]t follows ... that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." 270 U.S. at 55, 46 S.Ct. at 199. The

Court observed that the treaty between the United States and the Chippewas reserved lands in a general way for occupation by the Indians but did not affirmatively define the rights of the Indians in reservation lands or exlude others from the use of navigable waters within the reservation. Id. at 58, 46 S.Ct. at 200. Hence, the Court concluded, the treaty had not given the Indians title to the lake bed, even though the lake had been within the boundaries of the reservation.

A different result was reached in Choctaw Nation v. Oklahoma, 397 U.S. 620, 90 S.Ct. 1328, 25 L.Ed.2d 615 (1970). There the Supreme Court held that the Choctaw and Cherokee Nations had acquired sections of the riverbed of the Arkansas River in the State of

Oklahoma under treaties made between those Indian tribes and the United States. The opinion of the Court and the concurring opinion of Justice Douglas dwelt at some length on the history of relations between those tribes and the federal government, noting that the Indians had been forced, in consequence of repeated violations of promises made by the government, to leave their homelands in the southeastern part of the United States and move first to lands in the Arkansas Territory and then to lands west of the Arkansas Territory, presently located in Oklahoma. Id. at 622-28, 90 S.Ct. at 1330-33 (majority opinion); 637-38 nn. 2, 3, 90 S.Ct. 1337-38 nn. 2, 3 (Douglas, J., concurring). The Court also emphasized

that the treaties creating the reservation gave the Indians fee simple title to the lands and promised that "'no part of the land granted to them shall ever be embraced in any Territory or State.'" Id. at 634-35, 90 S.Ct. at ____. The Indians agreed to move to this reservation in return for "'a permanent home ... which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever.'" Id. at 624, 90 S.Ct. at 1336 (emphasis in original). From the language of the treaties as well as from the historical circumstances under which the Indians entered into the treaties, the Court inferred a congressional intention to convey to the Indians title to the bed of the Arkansas River, which was within the boundaries of the reservation.

The present case seems to me to be more similar to Holt Bank than to Choctaw Nation. The record reveals no history of broken promises or oppression by the government against the Colorado River Indians. The Indians have not been forced to settle hundreds of miles from their aboriginal homelands. More importantly, the act of Congress which created the Reservation used none of the language which the Court found determinative in Choctaw Nation. The act did not give the Indians fee simple title to reservation lands, nor did it promise that the reservation would be a "permanent home" or would be independent of any territory or state. The act gave the Indians the same unspecified rights of occupation which the Court in Holt Bank found insufficient to convey title to the

lake bed. Holt Bank, supra, 270 U.S. at 58, 46 S.Ct. at 200; see also Choctaw Nation, supra, 397 U.S. at 638-39, 90 S.Ct. at 1338 (Douglas, J., concurring).

Thus, I would hold that the establishment of the Colorado Indian Reservation did not give title to the easterly half of the riverbed. That title was held by the United States until Arizona became a state, at which time Arizona acquired title to the easterly half of the bed under the "equal footing" doctrine.

The majority in support of its holding that title to the easterly half of the riverbed passed to the Indians relies on the language of the 1876 Executive Order which fixed the boundary of the Reservation on the west bank of the river. I cannot accord that language

half, is to find sophisticated conveyancing where only the equivalent of a surveyor's imprecise calls with respect to the western boundary exist.

Reliance by the majority on the lifestyle of the Indians establishes at best only a reason for fixing the westerly boundary of the reservation so as to include the river. Access to fishing, which was needed, was thus assured. The Executive Order could not, to repeat, have been intended to convey title to one part of the stream bed. Why should it have intended to convey title to the other part in derogation of the responsibility of the United States to the future state of Arizona?

The Memorial of the Arizona Territorial Legislature to which the majority refers to support its position

the weight given it by the majority because it could not have been intended to convey legal title to the entire bed of the river inasmuch as California already owned its westerly half. It escapes me why the Order should be understood to convey that half which the United States ordinarily would hold in trust for a future state. How, it must be asked, could the future State of Arizona come into the Union on an "equal footing" with California if the title to the easterly half of the river were to be given to the Indians in 1876? What the majority overlooks is the reasonable probability that the Executive Order merely fixed the western boundary of the Reservation. To construe it as a conveyance of title to the easterly half of the bed, but not to the westerly

does not, as the majority suggests, "unequivocally" do so. To establish a reservation "on the east bank and bottom of the Colorado River" reasonably could be understood to refer to lands lying alongside the east bank of the river. A not unusual meaning of the word "bottom" when used as a noun is to designate the relatively level and sometimes grassy land lying adjacent to a river. This appears to me a much more probable meaning of the word as used in the Memorial than the assumption of the majority that it refers to the bed of the Colorado River.

The majority, of course, relies upon the canon that requires all ambiguities with respect to the intent of the United States to be resolved in favor of the Indians. Inasmuch as the

United States brought this suit on behalf of the Indians its use here may be questioned. As trustee of the Indians the United States must infuse its own action as the supreme sovereign, burdened with fiduciary duties owing to future states, with ambiguity in order to discharge properly its fiduciary duty to the Indians. That its duty to the Indians is superior to all others within the context of this case is beyond dispute; however, it does not flow automatically from this proposition that the courts should permit an ambiguity always to be resolved in favor of the Indians. A more nearly neutral approach to intent under such circumstances as are presented by this case strikes me as preferable.

Another difficulty with the canon's use is that it almost invariably means less than it appears to. Inasmuch as an ambiguity in the statute and executive orders clearly exists here, its use might be expected to be enough without more to decide the case. That this is not so is revealed by the supporting reasons the majority marshalls. However, how much less it means is never made clear. At its weakest it is but a makeweight. In the present case it should function no more strongly.

B. Location of Easterly Half of Riverbed

I acknowledge that a holding that title to the bed of the Colorado River did not pass to the Indians when the Colorado River Indian Reservation was established would present a difficult

problem. It would require the fixing of the location of the easterly half of the riverbed of the Colorado River prior to the construction of the cut-off channel by the Palo Verde Mutual Water Company. This problem could not be solved by adopting the median line of the 1919 channel as the district court did. Adoption of this line rested on the district court's holding that the eastern half of the riverbed belonged to the Indians, a position I rejEct. Nor can it be solved by the district court's finding of fact number 11 which reads:

> 11. Immediately prior to said avulsive change, the course and bed of the Colorado River was the westernmost of the two channels shown on the Engle maps, Exhibits 25 and 27 [Appendices C and D], which position of the river is supported by the Yost

sketch map, Exhibit 28,
labeled "Colorado River 1920."

This finding does not fix the eastern limit of the riverbed of the Colorado river. It is to that point, and not beyond, that I would hold the Indians own.

The appellants argue that the eastern limit of the riverbed is fixed by the easternmost channel of the Colorado River as reflected in Appendices C and D. This may not be so. Appendices C and D indicate that an island or sand bar existed between the two channels prior to the construction of the cut-off. Under California law, which appears to be applicable, an island which forms in the bed of a navigable stream belongs to the state. Cal.Civ.Code § 1016

(West 1954). However, an island which is created when a river divides to form two channels belongs to the original owner. Id. § 1018. Thus, an island, if such there was immediately prior to the cut-off's construction, may have been part of the Reservation and thus continues to belong to the Indians.

The present record simply does not permit fixing with any certainty the location of the eastern half of the riverbed. Therefore, I would remand to the district court for further proceedings.

FOOTNOTES

* Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

1/ The course of the river now appears to be somewhat to the west of the Olive Lake Cut. In resolving the issues of this case, however, we need not consider changes occurring after 1921.

2/ Our conclusion that this controversy should be decided in accordance with state law is not inconsistent ith our recent decision in United States v. Montana, 604 F.2d 1162, 1173-74 (9th Cir. 1979), cert. granted, 445 U.S. 960, 100 S.Ct. 1645, 64 L.Ed.2d 234 (1980), in which we reaffirmed our earlier ruling in United States v. Finch, 548 F.2d 822 (9th Cir. 1976), vacated on other grounds, 433 U.S. 676, 97 S.Ct. 2909, 53 L.Ed.2d 1048 (1977), and declined to apply Montana law in determining the title of the Crow Tribe into the bed and banks of the Big Horn River. In Finch and Montana, the question was whether the treaties creating the Crow Reservation had conferred title to the riverbed on the Indians, thus precluding

Montana from acquiring title to the bed upon its admission to the Union. The case did not raise any issue involving subsequent changes in title or deviations in the river's course. Hence, our inquiry began and ended with the construction of the Crow Indian Treaties as applied to a river within the Crow Reservation. This was purely a matter of federal law. In this case, similarly, we must apply federal law to decide whether the statute and executive orders which established the Reservation conveyed to the Indians the title to the riverbed. In determining the effect of subsequent changes in the river's course, however, Wilson requires, that state law serve as the rule of decision. Cf. Corvallis, supra, 429 U.S. at 371, 377, 97 S.Ct. 582, 590, 50 L.Ed.2d 550.

3/ In arguing that these lands were part of Arizona, the Indians may be suggesting that before the Pact, Arizona was rightfuly entitled to these lands even though California in fact exercised jurisdiction over them. We do not believe, however, that the Boundary Pact or the ratifying statutes require us to determine whether Arizona could rightfully have claimed sovereignty over these lands, since the Pact was adopted precisely for the purpose

of foreclosing such controversies. Cf. Nebraska v. Iowa, 406 U.S. 117, 122-23, 92 S.Ct. 1379, 1382-83, 31 L.Ed.2d 733 (1972). The Indians are not entitled to make for Arizona a claim which Arizona has relinquished.

4/ It is true that in City of Long Beach v. Mansell, 3 Cal.3d 462, 469 n.4, 91 Cal.Rptr. 23, 476 P.2d 423 (1970), the California Supreme Court referred to the artificial accretion exception without stating that the exception applied only to state sovereign lands. This statement occurred in a footnote as part of a two sentence summary of the rules governing accretion and avulsion. The footnote was only peripherally related to the issues in the case. Nothing in the footnote suggested, and we think it unlikely, that the court intended by this cursory description of the law to alter the rules governing accretion as more fully explained in earlier decisions.

5/ There has been some uncertainty over which bed was awarded to the State of California in the proceedings below. At oral argument, counsel for the United States, representing the Indians, admitted that he did not know which bed the state had received in the judgment. In a Supplemental Memorandum,

appellants declare that the State of California was awarded the bed west of "the midstream of the Colorado River prior to its avulsive change. . . ." (emphasis added), thus referring to the 1919 channel; later in the same memorandum, however, appellants suggest that California owns the western half of the 1908 riverbed. Because of this confusion, we quote findings 14 and 15 from the district court's findings of fact:

> 14. With respect to the lands shown on said Exhibit 9, as lying between the Colorado River as shown on Exhibit 9 and the median line as shown and described on Exhibit 9 [the median line of the westerly, 1919 bed is indicated on Exhibit 9], said lands, comprising about 1912 acres, are owned by the United States of America in trust for the benefit of the Colorado River Tribes. No part of said lands have ever been disposed of by the United States of America by patent or otherwise.
>
> 15. All that part of the abandoned bed of the Colorado River lying westerly of the median line described on Exhibit 9, as of the time the

river commenced flowing through the cut-off constructed by the Palo Verde Mutual Water Co. is owned by the State of California.

6/ Although we need not determine whether, but for the judgment below, and assuming that the river's westward movement was artificially-caused, California would rightfully be entitled to the 1908 bed rather than to the westerly bed, we do note that apellants' position on this issue is open to dispute. In the first place, it is not clear whether this issue, which would involve a determination of the boundary between California and Arizona during the period in question, would be governed by state or federal law. Under federal law, as we have observed, appellants' contention that the westward movement of the river was artificially-caused would be irrelevant. But even under state law, the issue is uncertain. To be sure, the court in Shasta indicated that the state retained title to the original riverbed and did not own the new bed after the Feather River changed its course as a result of artificial causes. In that case, however, the court noted that "the state does not claim the bed of the river in its present location." Shasta, supra, 264

Cal.App.2d at 535, 70 Cal.App.2d 618. If, on the other hand, the state were to relinquish its claim to the old bed and assert ownership over the newly-formed bed, thus declining to invoke the artificial accretion exception, as the state did in this case, it is not clear that a court applying California law would be required to reach the same result arrived at in Shasta.

7/ The dissent emphasizes language in Choctaw Nation that discusses the degree to which an Indian tribe is displaced, or the degree to which the granting language speaks of establishing a "permanent home" for the tribe, in deciding whether a riverbed was conveyed as part of the tribe's reservation. This inquiry was not utilized as a touchstone for decision in Choctaw Nation, however, but rather as a non-exclusive factor properly considered in determining governmental intent. Thus, the extent to which an Indian tribe was displaced, or the degree to which a treaty speaks of establishing a permanent location for a reservation, has no direct bearing per se on whether the government intended to convey the riverbed in any particular case. For example, because the history of the treaty involved in Choctaw Nation indicated that the Indians were granted "complete

sovereignty" over their new lands, the Court concluded that all lands within the metes and bounds of the Reservation, including the riverbed, were conveyed, so that the Indians might maintain dominion and control over their new home. 397 U.S. at 634-35, 90 S.Ct. at 1336. The Court noted that:

> [a]s a practical matter, reservation of the river bed [from the granted land] would have meant that petitioners were not entitled to enter upon and take sand and gravel or other minerals from the shallow parts of the river or islands formed when the water was low. In many respects however, the Indians were promised virtually complete sovereignty over their new lands . . . . We do not believe that petitioners would have considered that they could have been precluded from exercising these basic ownership rights to the river bed, and we think it very unlikely that the United States intended otherwise.

397 U.S. at 635, 90 S.Ct. at 1336 (citations omitted). Thus, the Court looked to the history of the dealings between the Indians and the government and to the perman-

ency expressed in the granting instrument, not as touchstones for decision (as impled by the dissent's analysis), but as indicia of intent.

Similarly, this court's decision in United States v. Finch, 548 F.2d 822 (9th Cir. 1976), vacated on other grounds, 433 U.S. 676, 97 S.Ct. 2909, 53 L.Ed.2d 1048 (1977), relied upon the fact that the reservation was expressly established as a "permanent home." The court, however, was again concerned with the permanency of the reservation only as evidence of the government's intent. See 548 F.2d at 832. As in Choctaw Nation, the permanency of the language of conveyance in Finch was merely a source from which, in the absence of anything more probative, the government's intent to convey disputed property could be inferred. We need not conclude that such intent was absent in the present case merely because it was neither manifested by language of "permanency" nor inferable from prior government dealings with the tribe. We look instead to other sources to find indications of the government's intent.

8/ The order of 1874 clarified these boundaries somewhat by setting forth specific mountain peaks to be

used as monuments.

9/ Similary vague language has been held clearly to convey a riverbed as part of the reservation being established. See Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 81-83, 43 S.Ct. 60, 61-62, 67 L.Ed. 140 (1922) (reservation held to include half of riverbed where boundary was "the main channel of the Arkansas River").

10/ The dissent argues that to draw such an inference is "to find sophisticated conveyancing where only the equivalent of a surveyor's imprecise calls" is in evidence, and that the intent of this order was only to fix in a general way the western boundary of the Reservation. We do not find it inconsequential, however, that the boundary was fixed by reference to the west bank instead of the east bank. Even if the intent of the order was as the dissent describes it, this does not explain why the boundary was set by the west bank; additional surveying complexities would have been avoided by adopting either as the boundary, and, absent an intent to convey the riverbed, the logical boundary choice would have been the nearer east bank. Additionally, the dissent ignores that the standard of review in this case requires us to resolve

ambiguities in the language of the order in favor of the Indians.

11/ The dissent suggests that this language is ambiguous, in that "bottom" may refer only to the lowlands that lie alongside the river, and not to the land underneath the river itself. Such lowlands, however, fall within the description "east bank." Thus, if "bottom" is to have any independent meaning, it must refer to the submerged bed of the river. Again, even if an ambiguity were present, the standard of review requires its resolution in favor of the Indians.

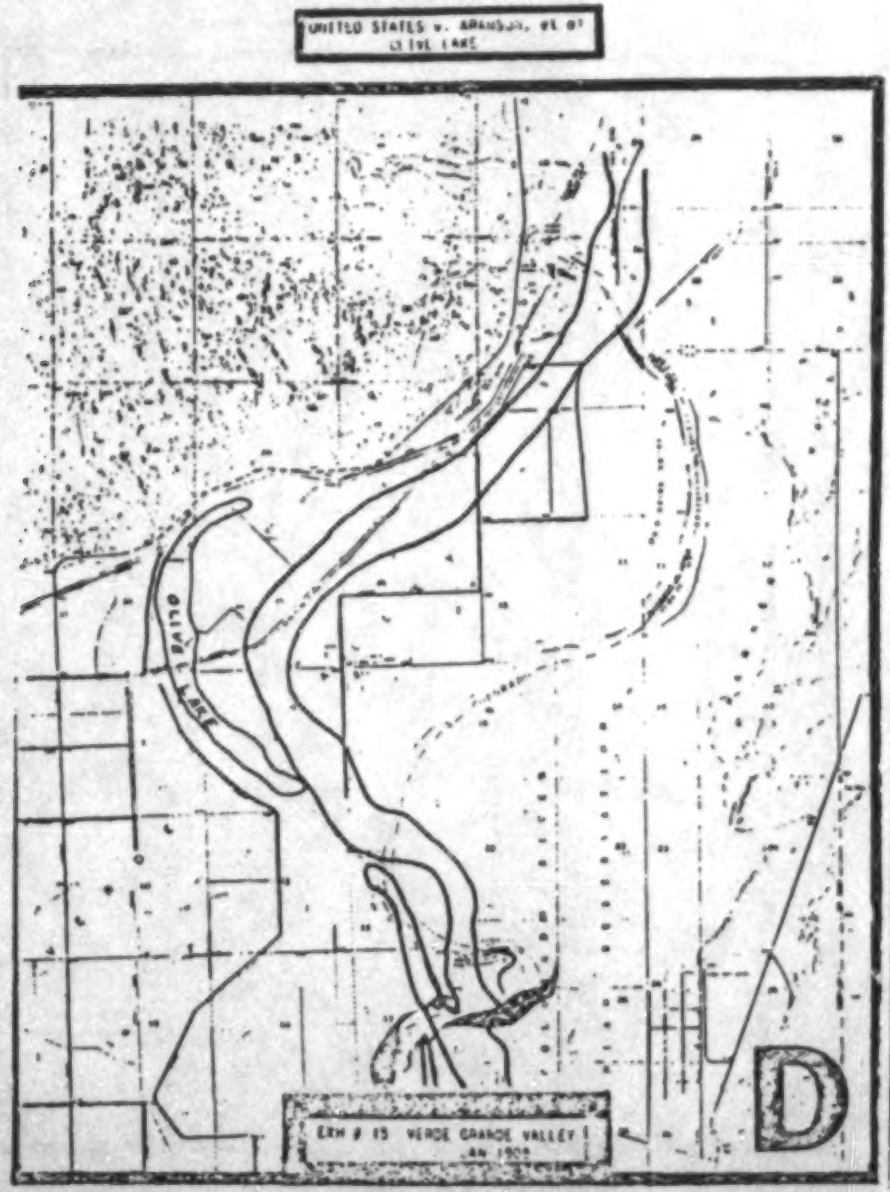
12/ Holt State Bank has not been overruled. It is, however, an aberrational case, and we believe that it was not only distinguished, but also limited by the Supreme Court's decision in Choctaw Nation, supra. Holt State Bank relies excessively upon the presumption against conveyances created in reliance on the equal footing doctrine by Shively v. Bowlby, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1894). See 270 U.S. at 54-55, 46 S.Ct. at 198-199. This presumption had not yet been judicially articulated at the time the conveyance presently concerning us occurred, was not found significant by the Court in Choctaw Nation, see 397 U.S. at 634, 90 S.Ct. at 1336,

and very possibly is not properly applicable in a case such as this one, where the land in question was conveyed by the government to itself in trust for an Indian tribe (a fact notably absent in Holt State Bank). See generally Note, Indian Rights to Lands Underlying Navigable Waters: State Jurisdiction Under the Equal Footing Doctrine vs. Tribal Sovereignty, 55 N.Dak.L.Rev. 453, 462, 466-67, 469-74 (1979).

APPENDIX A

Channel of the Colorado River

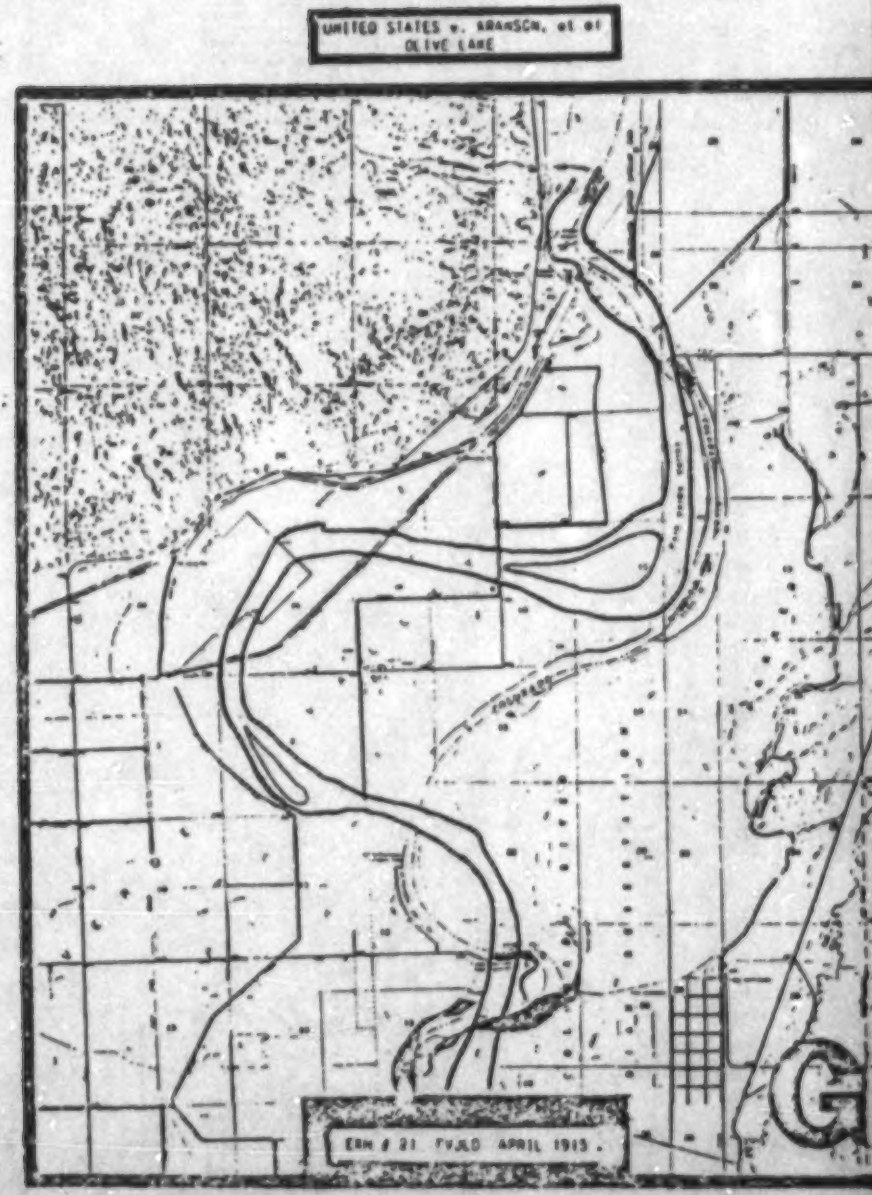
in 1908



APPENDIX B

Channel of the Colorado River

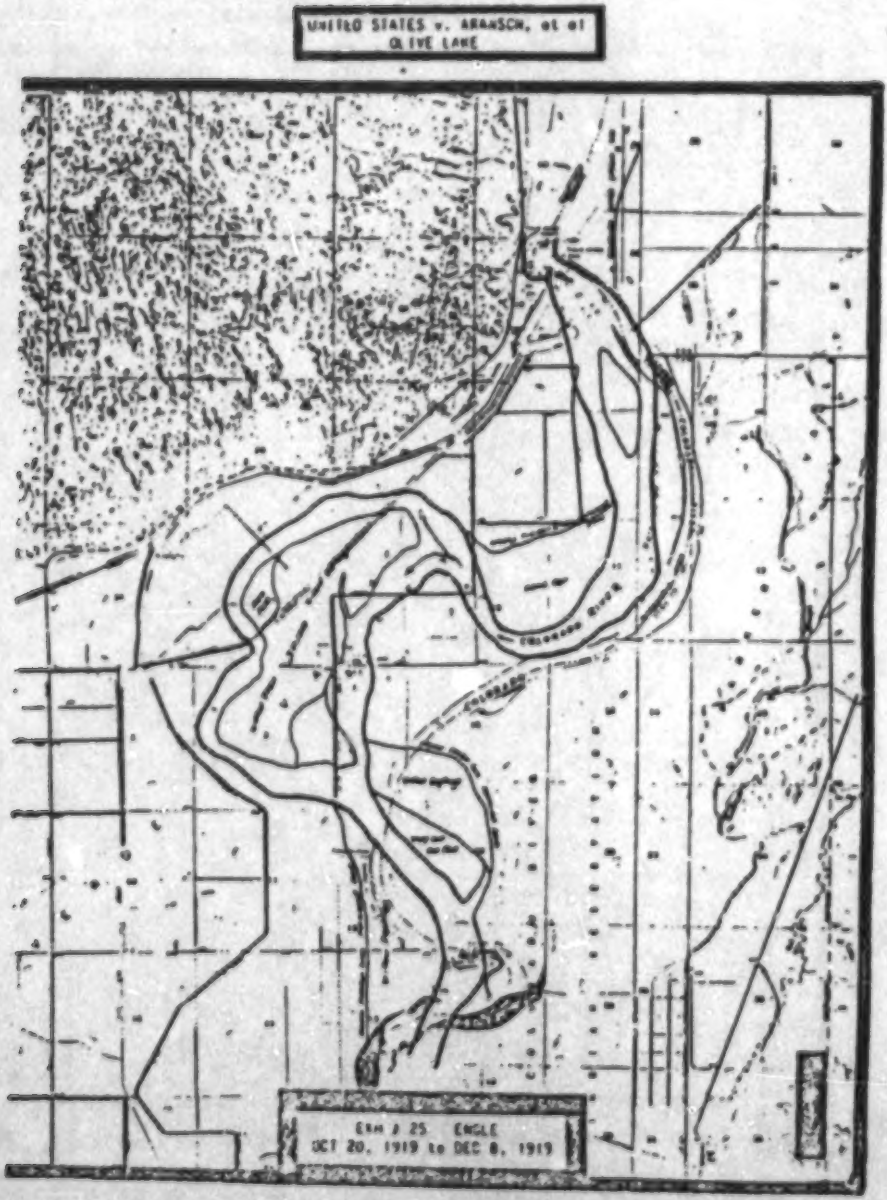
in 1915



APPENDIX C

Channel of the Colorado River

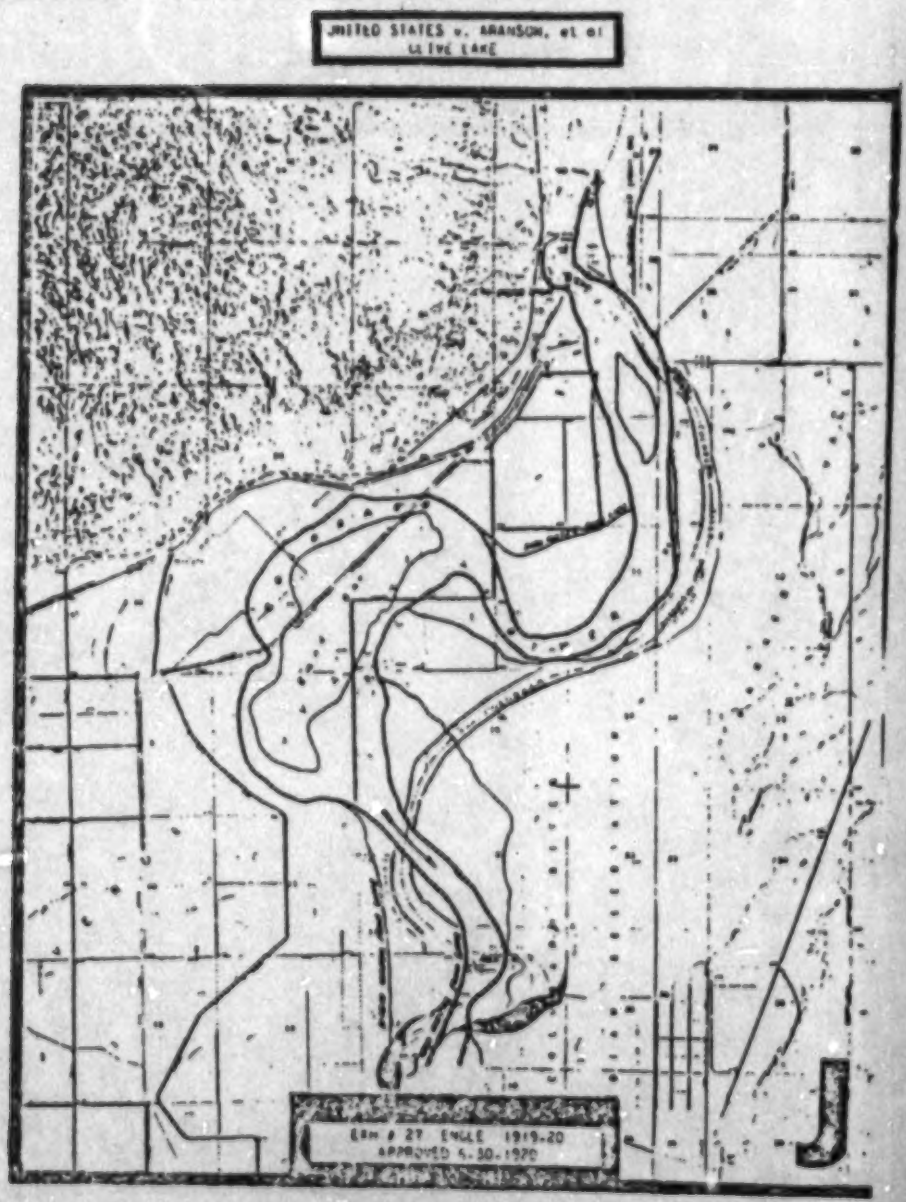
in 1919



APPENDIX B

Channel of the Colorado River

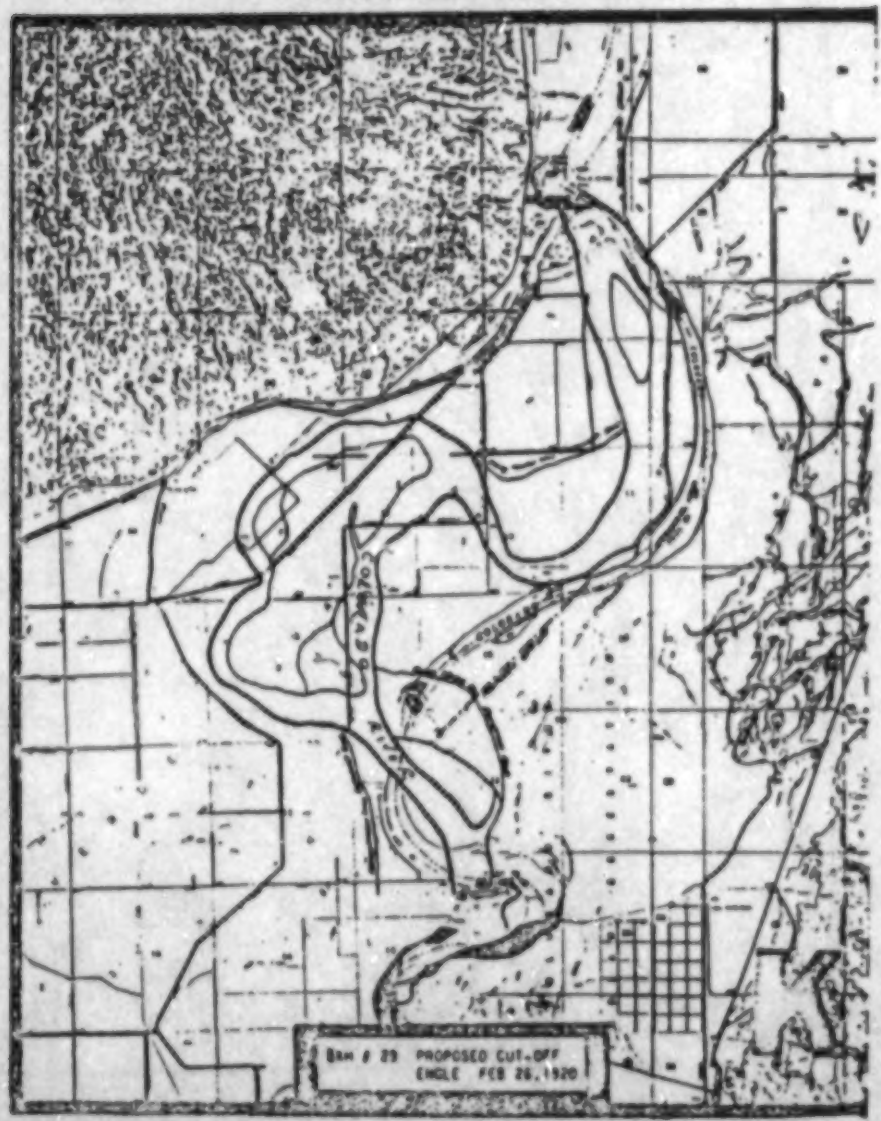
in 1919-1920



APPENDIX F

Proposed Location

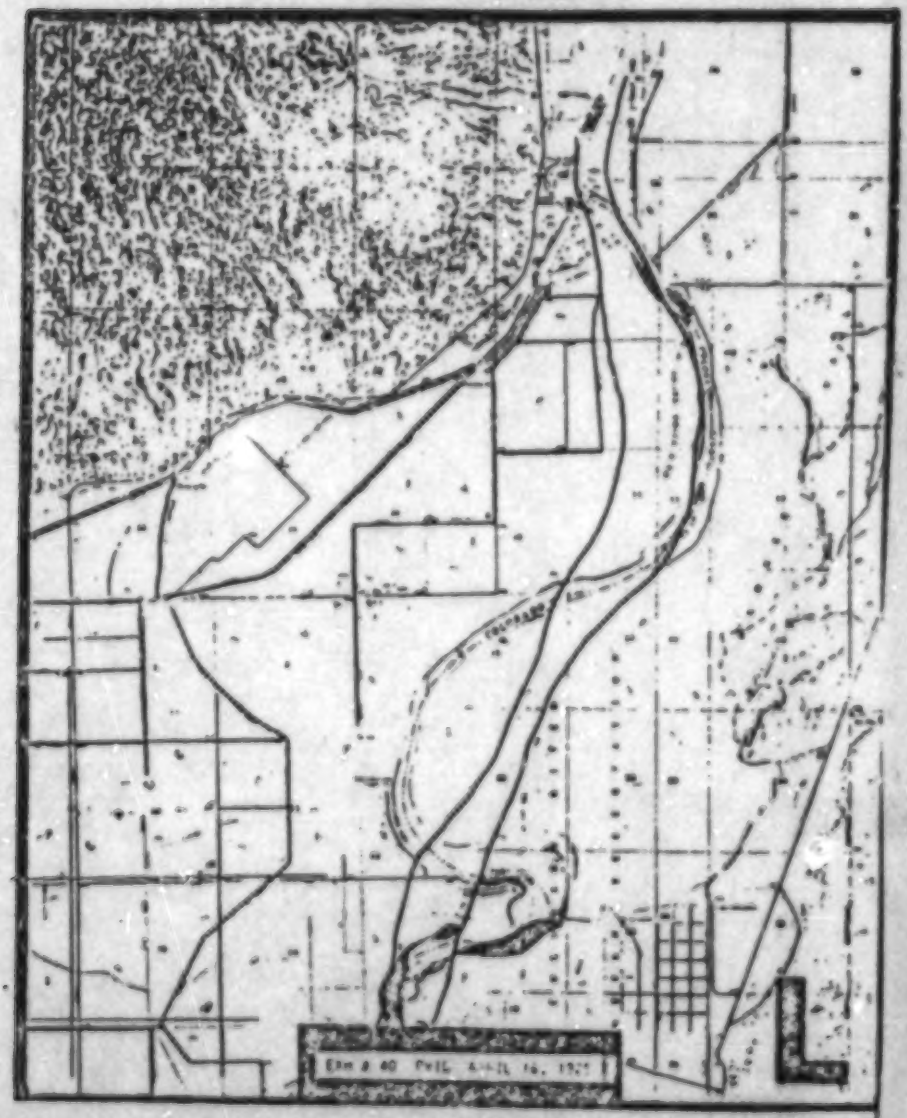
of Olive Lake Cut, 1920



APPENDIX F

Channel of the Colorado River

in 1935



QUESTIONS PRESENTED

1. Whether, in determining the ownership of accretions to riparian federal lands, the court of appeals erred in adopting and applying as the federal rule of decision the Arizona law of accretion.

2. Whether, under the circumstances of this case, the United States should be estopped from challenging the validity of petitioners' title.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2250

IVA MAY HARVEY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-50a) is reported at 661 F. 2d 767. The district court's Order Denying Defendants' and Plaintiffs' Motions for Summary Judgment (Pet. App. 51a-70a), Pre-trial Conference Order (Pet. App. 71a-88a), Memorandum and Order Denying Motions for Judgment Notwithstanding Verdict and for New Trial (Pet. App. 89a-104a), and Order re Counterclaims (Pet. App. 105a-112a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1981, and a petition for rehearing was denied on March 10, 1982 (Pet. App. 116a-117a). The petition for a writ of certiorari was filed on June 7, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This suit involves a dispute between petitioners and the United States concerning title to a 27-acre parcel of land located in the lower Colorado River Valley, approximately 17 miles south of Blythe, California. The jury found that the United States held title to the subject tract, known as "Harvey's Fishing Hole," and that verdict was upheld by the district court and the court of appeals. The relevant facts are summarized below.

1. In the immediate area at issue, the Colorado River flows in a general east to west direction, with California located to the north of the river and Arizona to its south. Originally, the United States owned all of the lands on both sides of the river. In 1914, the government issued a patent to a 160-acre tract then located in Yuma County, Arizona, to Cherry S.E. Carlin. In 1952, Carlin's successors-in-title conveyed their interests in a 40-acre portion of the lands described in the 1914 patent to Kindred E. Harvey and Iva May Harvey, husband and wife. Pet. App. 80a-84a.

When the 1914 patent was issued, all of the lands conveyed by it were located south of the river. However, between 1914 and 1935, when the river became stabilized at its present course, the channel moved in a southerly direction so that approximately 27 of the 40 acres described in the Harveys' deed became located on the north bank of the river (Pet. App. 84a, 119a-120a).[1] In 1960, the United States, which had retained title to all of the uplands on the north side of the river,[2] conducted a survey of the lands on

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[1]Approximately six acres of the lands described in the Harvey's deed remain on the south (Arizona) side of the river. The balance of the described 40 acres now form part of the river bed.

[2]The federal lands on the north side of the river were withdrawn from public entry by orders of the Secretary of the Interior issued in 1902 and 1929. These orders have never been revoked.

the north side. The survey depicted as government lands the 27-acre parcel on the north bank of the river, which is now in the same physical location as a portion of the lands described in the Harveys' deed (Pet. App. 85a, 119a-120a). A copy of the survey was filed in the local office of the Bureau of Land Management and notice of the survey was published in the Federal Register. 26 Fed. Reg. 7973 (1961).

In 1956, the Harveys had begun planning and developing a recreational-residential community called "Harvey's Fishing Hole," consisting of 96 lots to be located on the disputed tract. In 1956 and 1957, the Harveys cleared a large portion of the property of natural vegetation in preparation for development. During the same period, Kindred Harvey applied to the State of California for a permit to sell the lots. Thereafter, the permit was granted and the development of the subdivision commenced.[3] In 1958, the Harveys began to sell lots within the subdivision to various third parties. By the time the instant suit was filed in 1972, the Harveys had conveyed approximately 80 lots to third parties. Pet. 9-10; Pet. App. 86a-88a.

In October 1960, the United States filed a condemnation action against the property adjoining and immediately downstream from the lands at issue here. *United States* v. *11.8 Acres, Imperial County, California*, No. 2468-SD-K Civil (S.D. Cal.). In that action, the United States asserted that it owed no compensation because the subject land had been formed by accretion to government-owned lands in California and, therefore, was owned by the United States

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[3] Although the Harveys obtained a California subdivision permit allowing them to do business in California, the permit described the land as being in Yuma County, Arizona (Gov't Exh. 68). The property was carried on the Arizona tax rolls, and the taxes paid accordingly, until 1966, when Congress ratified the Colorado River Boundary Compact by which the two states agreed upon a border settlement under which the subject tract is in California (Pet. App. 86a).

rather than the private defendants (the defendants in the condemnation action, the Beavers, like petitioners here, traced their title to a 1914 federal patent that conveyed lands then located on the Arizona side of the river). The Harveys were served with a complaint in the condemnation suit on October 16, 1960. After the case had been tried, but before a decision had been rendered, the Harveys filed an answer asserting that attempts were being made to have the lands determined and adjudged as accretion lands, and that the determination would affect the rights and titles of the lands of the defendants. They further stated that the lands held by the defendants were in a similar category to the lands described in the cause of action. The government moved to strike the answer and it was later withdrawn without prejudice pursuant to a stipulation. Subsequently, the district court ruled that the condemned land had been formed by accretion and, thus, that the United States had held title to the tract ever since the land had emerged on the California side of the river. The court of appeals affirmed (*Beaver* v. *United States*, 350 F. 2d 4 (9th Cir. 1965)), and this Court denied a petition for a writ of certiorari (383 U.S. 937 (1966)). See generally 350 F. 2d at 6, 10.

With the *Beaver* litigation concluded, the United States, in early 1967, formally notified persons claiming interests in the Harvey's Fishing Hole lands that the tract was owned by the federal government. At the same time, the government extended an existing land use program to the subject lands. The purpose of the program was to allow squatters and trespassers along the lower Colorado River to remain, for a limited period, to use the land they had occupied if they would acknowledge title in the government and pay a reasonable rent. Gov't Exhs. 98, 116. The occupants of Harvey's Fishing Hole declined to participate in this program.

2. The government brought this action seeking ejectment and damages in 1972. In response, the defendants, among other things, asserted that their title was good because the land had arrived at its present location by avulsion rather than accretion and that, in any event, the United States was estopped from challenging the validity of their title. Both sides moved for summary judgment, and both motions were denied (Pet. App. 51a-70a).

The case was tried to a jury on the government's complaint for ejectment and damages and, at the same time, to the court on the defendants' quiet title counterclaim. The government's principal expert witness testified that, beginning during the period 1902-1914, if not earlier, a bend in the river had begun to move progressively toward the subject location, gradually eroding material from the south bank of the river and depositing other material by accretion on the north bank. This natural process continued in the ensuing years so that the 40-acre parcel began to be eroded away. After 1923, a nonfederal party made four river channel cuts upstream, which had the effect of accelerating the erosion and accretion process already underway. By 1930, the expert testified, most of the subject property had emerged on the California side of the river (Tr. 77-128). In opposition to this testimony, the defendants presented witnesses who testified that the change had been an avulsive one. Both sides also presented evidence concerning the estoppel issue.

The district court instructed the jury that it should return a verdict in favor of the government on the avulsion-accretion issue if it found that the subject land had been gradually deposited by accretion; conversely, the verdict should be for the defendants if the jury found the movement to have been caused by an avulsive change. No party

requested that the jury be instructed concerning changes induced or affected by artificial means.[4]

The jury returned a verdict in favor of the United States,[5] assessing damages at $42,451.04 (Pet. App. 118a). On January 14, 1977, the district court denied defendants' motions for judgment notwithstanding the verdict and for a new trial (Pet. App. 89a-104a), and on January 18, 1977, it entered findings of fact and conclusions of law in favor of the government on the defendants' counterclaims (Pet. App. 105a-112a).

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[4]The district court refused to give Defendants' Requested Jury Instruction No. 15 (R. 1008):

> In deciding whether the Colorado River moved by the process of accretion or avulsion, you should consider the respective interests of the parties in the land and whether a finding of accretion will result in a windfall to the U.S. Government or a taking of land from the defendants without compensation. Unless you find the land is necessary for navigational or some related purpose, you should not divest defendants of their title to "Harvey's Fishing Hole" by applying the doctrine of accretion. That is, you should consider the fairness of the end result before you make a finding of accretion or avulsion.

[5]The verdict included the following answers to special Interrogatories (Tr. 982-984):

> 1. Do you find the land now known as "Harvey's Fishing Hole" to have been formed by the process of accretion?
>
> Answer: Yes.
>
> 2. Do you find the land now known as "Harvey's Fishing Hole" to have been formed by the process of avulsion?
>
> Answer: No.
>
> 3. Do you find the Government, through its agents, to have engaged in affirmative conduct amounting to either a [mis]representation or concealment of material facts?
>
> Answer: No.

The defendants then moved for reconsideration or, in the alternative, for relief from the order and judgment. The defendants essentially contended that, while the jury had been instructed pursuant to the general federal common law of accretion and avulsion in accordance with this Court's then-prevailing decision in *Bonelli Cattle Co.* v. *Arizona*, 414 U.S. 313 (1973), that decision had been overruled by *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977). According to the defendants, *Corvallis* required that state law, rather than federal law, be applied here. The defendants further contended that the appropriate state law to be applied was the law of California and that, under California law, an upland owner does not acquire title to accretions to his property if those accretions are created by artificial means. Finally, they argued that the evidence introduced at trial showed that

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4. Do you find the Government, through its agents, to have had knowledge, actual or imputed, of the facts surrounding the defendants' title claims to "Harvey's Fishing Hole" at the time of its conduct?

Answer: Yes.

5. Do you find the Government, through its agents, to have intended its conduct to be acted upon by the defendants?

Answer: Yes.

6. Do you find the defendants to have been ignorant of the facts concerning the Government's claim to "Harvey's Fishing Hole" at the time when the conduct of the Government was done and at the time when it was acted upon by the defendants?

Answer: No.

7. Do you find that the defendants relied upon the conduct of the Government to their injury?

Answer: No.

8. Do you find that any of the defendants are liable to the plaintiff, United States of America, for reasonable rental value for occupying land within "Harvey's Fishing Hole"?

Answer: Yes.

"the movement of the Colorado River past Harvey's Fishing Hole was artificially induced and hence not accretion under the California definition of that term." R. 929. The district court denied the motion for reconsideration. Pet. App. 113a-115a.

3. The court of appeals affirmed (Pet. App. 1a-50a). In view of this Court's intervening decision in *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979), the court ruled that the district court should have adopted state law as federal law rather than applying general federal common law. The court of appeals, however, rejected the defendants' contention that the state law that should have been adopted as federal law was California law. Rather, the court stated that the district court should have adopted Arizona law as federal law. Nevertheless, the court held, since Arizona law is indistinguishable from the general federal common law for the purposes of this case, no material error had been committed. Pet. App. 15a-24a.

The court of appeals also rejected the defendants' argument that the jury's finding of an accretion, rather than an avulsion, was not supported by substantial evidence. Pet. App. 24a-30a.

Finally, the court of appeals concluded (Pet. App. 30a) that "the trial court correctly instructed the jury on equitable estoppel and that substantial evidence supported the jury's verdict" on this issue as well. The court first stated that, under applicable precedents of the Ninth Circuit, the United States could be estopped in a case involving the federal lands only where, in addition to the usual elements of estoppel, the private litigants "establish equities that, on balance, outweigh the 'inherent equitable considerations which the government asserts as the constitutional trustee on behalf of all the people' " (*id.* at 32a-33a, quoting *United States* v. *Ruby Co.*, 588 F. 2d 697, 705 (9th Cir. 1978), cert. denied, 442 U.S. 917 (1979)) and where the government is

guilty of affirmative misconduct (*id.* at 33a-34a). Reviewing the evidence, the court found that the government had not committed any affirmative misconduct upon which the defendants had relied (*id.* at 35a-43a). Accordingly, the court concluded (*id.* at 43a), "[b]ecause there has been an inadequate showing of equitable estoppel, [it was not required to] consider the additional balancing test required when equitable estoppel is asserted against the government."

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any court of appeals. Further review by this Court is therefore not warranted.

1. Petitioners contend (Pet. 26-29) that state law controls this case because it is like *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), in which this Court ruled that state law governed, and unlike *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979), in which federal law was applied. Like *Wilson*, however—and unlike *Corvallis*, which involved solely nonfederal claims of ownership affected by a stream located entirely within a single state—this case concerns title to lands that have become attached to lands which have been in federal ownership ever since they became part of this Nation. This case therefore is governed by federal law. As the Court stated in *Wilson, supra*, 442 U.S. at 670, and reiterated in *California ex rel. Lands Commission* v. *United States*, No. 89, Orig. (June 18, 1982), slip op. 9, "the general rule recognized by *Corvallis* does not oust federal law in this case. Here, we are not dealing with land titles merely derived from a federal grant, but with land with respect to which the United States has never yielded title or terminated its interest."

2. In *Wilson, supra*, 442 U.S. at 672, this Court recognized that controversies governed by federal law do not always require application of uniform federal rules and

that, in some cases, state law should be borrowed and applied as the federal rule. Petitioners suggest that the courts below were obligated to select California law, rather than Arizona law or general federal common law, as the appropriate standard to be applied here. They further suggest that under California law, an owner of property bounded by a stream does not acquire title to accretions to his uplands holdings if those accretions were artifically induced. Neither suggestion has merit.

In applying Arizona law, the court of appeals faithfully followed *Wilson, supra*, and *Nebraska* v. *Iowa*, 406 U.S. 117 (1972). Here, Arizona and California have entered into a boundary agreement that, like the interstate compact between Iowa and Nebraska, does not explicitly prescribe a choice of law rule but does obligate the parties to respect title to any ceded lands if that title was good in the other jurisdiction.[6] This Court's decisions in *Wilson, supra*, 442

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[6]In ratifying the Interstate Compact Defining the Boundary Between the States of Arizona and California (consented to by Act of Aug. 11, 1966, Pub. L. No. 89-531, 80 Stat. 340), Arizona and California each adopted an identical "preservation of rights" provision, which declares:

> Nothing contained in the provisions of this act * * * shall prejudice the titles, rights or claims of any person, public or private, natural or artificial, to any of the lands herein involved, whether such titles, rights or claims arise or exist upon the basis that the lands affected by the designation of boundary as set forth in the compact and in this act were previously a part of the state of Arizona and have now become a part of the state of California, or were previously a part of the state of California and have now become a part of the state of Arizona, or otherwise * * *.

1963 Ariz. Sess. Laws. ch. 77, § 5, *reprinted in* annotation to Ariz. Rev. Stat. Ann. § 41-522 (West 1974); 1963 Cal. Stats. ch. 859, § 4, *reprinted in* annotation to Cal. Gov't Code § 175 (West 1980).

Compare Section 3 of the Nebraska-Iowa Compact (see *Wilson, supra*, 442 U.S. at 676-677 n.22):

> Titles, mortgages, and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa and any

U.S. at 676-678, and *Nebraska* v. *Iowa*, *supra*, counsel that, where such a provision is in effect and a dispute arises concerning lands that were once within one jurisdiction but have passed to the other, the dispute ordinarily shall be governed by the law of the jurisdiction where the land originally was located. Because the land at issue here was in Arizona when it was initially surveyed and patented, Arizona law, rather than California law, should be borrowed as the applicable federal rule.[7]

3. Petitioners also suggest (Pet. 34-41) that the court of appeals erred in construing Arizona law as following the common law rule that an uplands owner requires title to accretions to his property, whether they be naturally or

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pending suits or actions concerning said lands may be prosecuted to final judgment in Nebraska and such judgments shall be accorded full force and effect in Iowa.

[7]Petitioners argue (Pet. 30-34) that the court of appeals' decision to apply Arizona law here is contrary to that court's prior decisions in *United States* v. *Southern Pacific Transportation Co.*, 601 F. 2d 1059 (1979), and *United States* v. *Aranson*, No. 77-2295 (Mar. 30, 1981), withdrawn, Apr. 17, 1981 (Pet. App. 121a-215a). In *Southern Pacific*, however, there was no party asserting a claim based upon title to lands once within Arizona and, hence, there was no occasion to choose between California and Arizona law. By contrast, *Aranson* did apply California law to lands once within Arizona; that opinion, however, has been withdrawn. At all events, any intra-circuit conflict on this issue should be resolved by the court of appeals itself. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam).

Petitioners also assert (Pet. 31-32) that the United States, as owner of the California uplands, cannot "seriously" contend that California law is not applicable here. *California ex rel. Lands Commission*, *supra*, however, disposes of this argument. Moreover, it may be argued with greater force that petitioners cannot complain of the application of Arizona law, since they claim title through a federal patent pertaining to lands in Arizona and, as petitioners themselves point out (Pet. 17), Arizona asserted political jurisdiction over the subject area and petitioners paid Arizona real property taxes prior to 1966.

artificially induced. By statute, however, Arizona has adopted the common law as the rule of decision in its courts insofar "as it is consistent with and adapted to the natural and physical conditions of this state and the necessities of the people thereof, and not repugnant to or inconsistent with the Constitution of the United States or the constitution or laws of this state, or established customs of the people of this state * * *." Ariz. Rev. Stat. Ann. § 1-201 (West 1974). Since no such inconsistent law or established custom has been suggested here, and in the absence of any controlling state court decision, it must be presumed that Arizona would follow the common law rule. *State* v. *Bonelli Cattle Co.*, 107 Ariz. 465, 489 P.2d 699 (1971), aff'd on rehearing, 108 Ariz. 258, 495 P.2d 1312 (1972), rev'd, 414 U.S. 313 (1973), relied upon by petitioners (Pet. 35-41), is not to the contrary. In that case, the Arizona Supreme Court rejected the uplands owner's claim that he was entitled to artificially induced "accretions" on the ground that no accretion had occurred, but rather that the channel had been uncovered "rapidly and perceptibly." 107 Ariz. at 468, 489 P.2d at 702. See 414 U.S. at 317.[8] By contrast, the jury found the present case involves a gradual accretion.[9]

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[8]That this Court, applying federal common law, subsequently concluded that the surfacing of the land was an accretion, rather than an avulsion (414 U.S. at 328-329), has no bearing on the reasoning employed by the Arizona Supreme Court.

[9]Petitioners also contend (Pet. 41-46) that the district court erred in refusing to give Defendants' Requested Jury Instruction No. 15 (see page 6 note 4, *supra*). However, the proposed jury instruction is not supported by this Court's *Bonelli* decision. Rather, on its face, it is a transparent invitation to the jury to decide the case on the basis of sympathy.

4. In any event, the United States would prevail here even if California law were applied. The usual common law rule is that the holder of uplands acquires title to accretions to his lands whether those accretions result from natural causes or are artificially induced. *Bonelli Cattle Co.* v. *Arizona*, 414 U.S. 313, 327 (1973); *County of St. Clair* v. *Lovingston*, 90 U.S. (23 Wall.) 46, 68 (1874). Cal. Civ. Code § 1014 (West 1954) provides:

> Where, from natural causes, land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right of way over the bank.

Petitioners rely upon the phrase "from natural causes" to read into the California statute the negative inference that an uplands owner does not acquire title to accretions that have been artificially induced.[10] The California courts, however, have not drawn such an inference in disputes involving competing riparian landowners.[11] While the State courts have held that a littoral landowner may not take advantage of artificial devices so as to obtain title to accretions that would otherwise have remained part of the

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[10]Petitioners do not address the question of who, under their view of California law, takes title to the "artificial accretions" if the owner of the uplands to which they have become attached does not do so. The state, as the owner of the bed of the navigable river upon which the accretions have settled and emerged, would seem to have as arguable a claim to the subject lands as petitioners.

[11]Analogously, the California courts have not construed Cal. Civ. Code § 1014 (West 1954) in its narrow, literal sense, as applying only to accretions formed along the banks of rivers or streams, but have applied it as well to alluvion forming along the seashore. See *City of Los Angeles* v. *Anderson*, 206 Cal. 662, 667, 275 P. 789, 791 (1929).

seabed or tidelands (see *California ex rel. Lands Commission, supra*, slip op. 3-4; see also *City of Los Angeles* v. *Anderson*, 206 Cal. 662, 667, 275 P. 789, 791 (1929); *Carpenter* v. *City of Santa Monica*, 63 Cal. App. 2d 772, 147 P.2d 964 (1944)), the California courts follow the usual common law rules in disputes concerning lands along non-tidal rivers and streams. See *Carpenter* v. *City of Santa Monica, supra*, 63 Cal. App. 2d at 787, 147 P.2d at 972 (emphasis added):

> There are no doubt many federal cases, following the leading case of *St. Clair County* v. *Lovingston*, 90 U.S. 46, 23 L. Ed. 59, relied upon by appellant which hold that as between competing upland owners, or as between upland owners and others not claiming tidelands as successors of the state, artificial accretions belong to the upland owner. This is the general common law rule and probably the rule in *this state*. *Forgeus* v. *Santa Cruz County*, 24 Cal. App. 193, 140 P. 1092. An entirely different rule may apply, however, where the upland owner attempts to assert title to lands formed by artificial accretions against the claim of the state, or its successor in interest, that such lands are tide lands.

Accord, *Forgeus* v. *Santa Cruz County*, 24 Cal. App. 193, 199-200, 140 P. 1092, 1094-1095 (1914).

Even if the law were as petitioners suggest, however, the government nevertheless would prevail here because the subject accretion was not "caused" by artificial means. Petitioners based their case at trial on the theory that an avulsion had occurred. This theory was rejected by the jury. By contrast, the government's expert witness testified that the Colorado River, which has had a long history of movement by erosion and accretion in this area before the closure of Hoover Dam, had been moving toward the subject parcel for years before several upstream channel cuts were made

by a nonfederal party, which accelerated the natural river channel movement already well underway. This is thus not a case in which the accretions were artificially induced; the river's movements would have followed the same pattern over time even if no artificial changes had intervened.

5. Moreover, there is good reason to believe the district court was right, in the first place, to apply federal law, without any borrowing from the accretion rules of either Arizona or California. Indeed, in *California ex rel. Lands Commission, supra*, the Court found "dispositive in itself * * * the fact that Congress has addressed the issue of accretions to federal land," referring to Section 5(a) of the Submerged Lands Act of 1953, 43 U.S.C. 1313(a), which declares that accretions to lands acquired or reserved by the United States remain in federal ownership and overrides any contrary State law rule. Slip op. 9-10. See also *id.* at 13-14; 1-2 (Rehnquist, J., concurring).

To be sure, in *California ex rel. Lands Commission*, the Court was dealing with accretions to federal lands along the open coast. But Section 5(a) of the Submerged Lands Act is not so limited. In terms, the provision applies to all "lands beneath navigable waters" covered by the Act, and, as Section 2(a)(1) makes clear, that description expressly encompasses not merely submerged lands and tidelands off the seacoast, but also the bed and banks of non-tidal inland navigable waters. 43 U.S.C. 1301(a)(1), 1313(a). Accordingly, it would seem that, in this context as well, "borrowing for federal law purposes a state rule that would divest federal ownership is foreclosed." *California ex rel. Lands Commission*, slip op. 10.[12]

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[12]Arguably, Section 5 of the Submerged Lands Act was equally applicable in *Wilson* v. *Omaha Indian Tribe, supra*. See 43 U.S.C. 1313(b). But the point was not addressed in that case and, at all events, the question there was *whether* the geographical change was accretive or avulsive. In the present instance, the jury's verdict settles that accretion occurred.

6. Petitioners finally contend (Pet. 46-63) that the courts below erred by adopting an unduly restrictive standard in cases involving attempts to estop the government from asserting its title to federal lands. No special standard applicable solely to litigation against the government is necessary to sustain the result here, however. As between private litigants, the party seeking to estop the other must show not only that the opposing party knowingly misrepresented a material fact, but also that the party invoking estoppel was ignorant of the true facts and that he relied upon the opposing party's misrepresentations to his detriment. *United States* v. *Ruby Co.*, 588 F.2d 697, 703 (9th Cir. 1978), cert. denied, 442 U.S. 917 (1979); *Hampton* v. *Paramount Pictures Corp.*, 279 F. 2d 100, 104 (9th Cir.), cert. denied, 364 U.S. 882 (1960). By its answers to the following interrogatories, the jury unequivocally found the latter two elements missing (R. 983):

> 6. Do you find the defendants to have been ignorant of the facts concerning the Government's claim to "Harvey's Fishing Hole" at the time when the conduct of the Government was done and at the time when it was acted upon by the defendants?
>
> Answer: No.
>
> 7. Do you find that the defendants relied upon the conduct of the Government to their injury?
>
> Answer: No.

These findings were amply supported by the evidence.[13]

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[13]Petitioners, who claim title through a patent conveying lands in Arizona, attempt simply to overlook the obvious fact that the land in question is located on the California side of the river. This fact alone was enough to indicate that there might well be questions concerning the validity of their claims to title. They likewise disregard the fact that, in the 1960 *Beaver* condemnation action, the government successfully asserted that the tract immediately adjoining the subject parcel had been formed by accretion and was therefore owned by the United States.

Although in view of these findings by the jury, the court of appeals did not have to reach the issue, it nevertheless correctly ruled (Pet. App. 42a) that, at least in the absence of "affirmative misconduct," the United States cannot be estopped from asserting its rights by the unauthorized actions or inaction of its agents. This holding is in accord with a long line of decisions by this Court. *Schweiker* v. *Hansen*, 450 U.S. 785, 788-789 (1982); *INS* v. *Hibi*, 414 U.S. 5, 8-9 (1973); *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 384 (1947); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 408-409 (1917).[14]

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[14]Petitioners claim (Pet. 50) that "no special, extra balancing test nor generally restrictive approach has ever been required by this Court in land title disputes between citizens and the United States." The court of appeals applied no such special test, however, concluding (Pet. App. 43a) that "[b]ecause there has been an inadequate showing of equitable estoppel, we need not consider the additional balancing test required when equitable estoppel is asserted against the government." In any event, this Court has indeed applied stringent rules in estoppel cases involving the federal lands. *Jeems Bayou Fishing & Hunting Club* v. *United States*, 260 U.S. 561, 564 (1923); *Utah Power & Light Co.* v. *United States*, *supra*, 243 U.S. at 409. As this Court explained in *United States* v. *California*, 332 U.S. 19, 40 (1947) (footnote omitted):

> The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IVA MAY HARVEY, a widow, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

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A Reply Brief was filed on behalf of certain Petitioners on August 27, 1982. In order to avoid repetition of arguments raised therein, Petitioners represented by the undersigned counsel incorporate by reference and adopt the arguments raised in that brief. Additional arguments are set forth below.

I. THE GOVERNMENT HAS FAILED TO DEMONSTRATE AN OVERRIDING FEDERAL INTEREST IN THE LANDS AT ISSUE TO JUSTIFY APPLICATION OF FEDERAL COMMON LAW TO DETERMINE TITLE THERETO.

Neither this Court's decision in California ex rel. State Lands Commission, ___ U.S. ___, 50 U.S.L.W. 4672 (June 18, 1982), rendered shortly after the filing of the Petition for Writ of Certiorari in this case, nor its earlier decision in Wilson v. Omaha

Indian Tribe, 442 U.S. 653 (1979), supports Respondent's argument that federal common law, rather than state law, provides the rule of decision for determination of title to the lands at issue here. To the contrary, Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977), demands that state law determine questions of property ownership, unless some overriding federal interest requires a different result. 429 U.S. at 378. See Wilson, 442 U.S. at 669. Such overriding federal interests have not been shown by Respondent to exist here. Reliance on Wilson and State Lands Commission is therefore misplaced.

In Wilson, federal common law was applied because otherwise, the

government's title to Indian Reservation lands would have been divested. It was not only that the federal government had never parted with title to the subject lands, but also that the Indians' right to the property depended on federal law, which established the overriding federal interest sufficient to justify application of federal common law. 442 U.S. at 670.

In the instant case, although the federal government never parted with land north of the river, it did do so with respect to land south of the river, thereby knowingly subjecting determination of title to that land to application of state law. More importantly, as distinguished from Wilson, application of federal law in the instant case is

not necessary to maintain the federal interest. 1/ Its application merely results in a windfall to the government, at the expense of private parties who have always had legitimate expectations that their title would be determined according to state law, and who would have been correct in that expectation absent the mere coincidence of federal ownership on the opposite bank of the river. Cf. Wilson, 442 U.S. at 674.

This Court has scrupulously avoided choice of law which would result in such a windfall. See Corvallis, 429 U.S. at 370; Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 322, 328 (1973). In fact,

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1/ Application of state law in Wilson would have caused a substantial forfeiture of federal lands.

this Court has suggested that in determining whether to apply the doctrine of accretion or avulsion, the relative interests of the competing parties must be considered. See Bonelli, 414 U.S. at 328-29. [2/] Cases cited by both parties demonstrate choice of law being made in such a manner as to avoid working a substantial forfeiture. See, e.g., State Lands Commission, 50 U.S.L.W. at 4674; Wilson, 442 U.S. at

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2/ At trial, Petitioners' proposed jury instruction to this effect was rejected. Respondent's reference to the proposed instruction as an "invitation . . . to decide the case on the basis of sympathy," Respondent's Brief at 12 n.9, ignores not only the language in Bonelli cited above, but also the references thereto in Corvallis. 429 U.S. at 370. This aspect of Bonelli, i.e., application of the federal common law of accretion, was not overruled by Corvallis.

671; Nebraska v. Iowa, 406 U.S. 117 (1972).

This Court's decision in State Lands Commission adds nothing to Respondent's case insofar as the overriding federal interest asserted there, i.e., the boundaries of the international sea, was quite clearly,

> too close to the vital interest of the nation in its own boundaries to allow it to be governed by any but the 'supreme law of the land.'

State Lands Commission, 50 U.S.L.W. at 5674, quoting, Hughes v. Washington, 389 U.S. 290, 293 (1967). State Lands Commission merely recognizes that Corvallis did not overrule Hughes sub silentio. See State Lands Commission, 50 U.S.L.W. at 4674. Cf. Corvallis, 429 U.S. at 383 (Marshall, J., dissenting).

Federal ownership along a waterway hardly rises to the same level of interest as the location of the international boundary. Respondents would create an exception to Corvallis, based on mere federal ownership, an interpretation which was specifically rejected in Wallis v. Pan American Petroleum Corp., 384 U.S. 63 (1966). In that case, involving rights associated with mineral leases on public lands, it was argued that:

> because leases are issued by the United States and concern federal lands, there is a federal interest in having private disputes over them justly resolved.

384 U.S. at 68. In refusing to supplant state law, this Court stated that:

> Apart from the highly abstract nature of this interest, there has been no showing that state

law is not adequate to achieve it.

Id.

In sum, invocation of federal common law is justified upon a showing of not merely a federal interest, but an overriding one. Respondent having failed to demonstrate an overriding federal interest, Corvallis requires that state law, and in particular that of California, govern in this case.

II. ASSUMING, ARGUENDO, THAT FEDERAL COMMON LAW APPLIES IN THIS CASE, STATE LAW SHOULD REMAIN THE RULE OF DECISION.

Even when the federal interest justifies application of federal common law, state law may be borrowed as the federal rule of decision. 3/ See

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3/ Choice of federal or state law is based on consideration of whether a (continued)

Wilson, 442 U.S. at 673; State Lands

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uniform national rule is necessary, the impact on federal policy or functions, and the impact of a federal rule on existing relationships under state law. See Wilson, 442 U.S. at 673. Reference to state law in the case at bar would not frustrate federal policy or functions because the title to lands which the federal government had a legitimate interest in maintaining, i.e., those north of the river at the time of the patent, are not at issue and are fully preserved. Gaining a windfall at the expense of private landowners can hardly be said to constitute an overriding federal policy. See Board of County Commissioners v. United States, 308 U.S. at 352 (state law absorbed as federal rule because state interest not inconsistent with federal policy). That there is no need for a uniform national rule and that a federal rule is likely to have an adverse effect on existing relations under state law is demonstrated by the fact that property ownership has traditionally been considered a matter of state law. See Wilson, 442 U.S. at 674; Corvallis, 429 U.S. at 378; Hughes v. Washington, 389 U.S. 290, 295 (1967) (Stewart, J., concurring).

Commission, 50 U.S.L.W. at 4674; [4] Board of County Commissioners v. United States, 308 U.S. 343 (1939). Nevertheless, the district court, in applying federal common law, failed to consider applicable state law, particularly that of California, which has a paramount interest as the state in which the land is located. [5] In fact, the only issue

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4/ Though this Court failed to adopt California law with respect to artificial accretion as a rule of decision in State Lands Commission, it did not foreclose the possibility of doing so in some future, more appropriate, case. See 50 U.S.L.W. at 4675.

5/ Nor did the court consider a potentially dispositive exception to the federal common law rule of accretion which this Court expressly recognized in Corvallis.

> [W]here a river changes its main channel, not by excavating, passing over,

(continued)

which has ever been presented to a jury

> and then filling the intervening place between its old and its new main channel, but by flowing around this intervening land, which never becomes in the meantime its main channel, and the change from the old to the new main channel is wrought during many years by the gradual or occasional increase from year to year of the proportion of the waters of the river passing over the course which eventually becomes the new main channel, and the decrease from year to year of the proportion of its water passing through the old main channel until the greater part of its water flows through the new main channel, the boundary line between the estates remains in the old channel subject to such changes in that channel as are wrought by erosion or accretion while the water in it remains a running stream.

429 U.S. at 367, quoting, Commis-
(continued)

in this case is whether the river moved slowly and imperceptibly or whether it moved suddenly. No consideration has been given to the cause of the shift or the manner in which the shift occurred,

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sioners v. United States, 270 F. 110 (8th Cir. 1920). Instruction as to this aspect of the federal law of accretion may well have proven decisive in light of Petitioner's evidence, duly noted by the Ninth Circuit, that there existed "an abandoned channel that the witnesses claimed could not have existed if the river had moved slowly by accretion." 661 F.2d at 772. Indeed, there was eyewitness testimony that during the flood of 1921, Harvey's Fishing Hole appeared as an island with the river running on both sides of it. RT 512.

Although legal issues not raised below are generally not considered on appeal, that rule is not inflexible, and this Court has stated its willingness to consider such issues in order to prevent manifest injustice. See Hormel v. Helvering, 312 U.S. 552, 556-57 (1941).

factors which are relevant under either state or federal law. 6/ Indeed, even if state law is not borrowed, the case at bar is appropriate for review by this Court to consider judicial development of this area of federal common law. Cf. State Lands Commission, 50 U.S.L.W. at 4674-75.

III. THE LAW OF CALIFORNIA, AS THE STATE WITH A PARAMOUNT INTEREST IN THE LANDS AT ISSUE, DETERMINES THE QUESTION OF TITLE TO LAND LOCATED THEREIN.

Respondent's reliance on Nebraska v. Iowa, 406 U.S. 117 (1972), in support of its argument that the law of Arizona, and not that of California, governs the instant case, is misplaced. In that

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6/ The Ninth Circuit conceded that under federal common law, the cause of the accretion was relevant. See 661 F.2d at 772, n.7.

case, it was held that an interstate compact between Nebraska and Iowa required title to land which was valid in Nebraska prior to the cession made by the compact, to be recognized in Iowa. The terms of the compact construed in that case expressly dictated such a result. See Wilson, 442 U.S. at 678. The Court refused to compel landowners to prove where the land was located at the time the compact was enacted when the states had entered into the compact because of their inability to do so.

The rationale of the Nebraska case dictates that California law apply because that is where the land at issue was clearly located prior to the enactment of the Arizona-California Compact. See United States v. Aranson, No. 77-

2295 (9th Cir. March 30, 1981), withdrawn, April 17, 1981. Respondent's reference to the law of the state in which the land was "originally" located, misconstrues the Court's use of that word in the Nebraska case. Since the issue in that case was one of construing the compact, the word "originally" simply refers to the time before the land was ceded to Iowa. Had the land shifted from Iowa to Nebraska prior to the compact ceding it back to Iowa, presumably Nebraska law would still have applied.

The case at bar calls for application of California law for several reasons. 7/ First, there is no question

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7/ General objection to applying state property law to federal lands were (continued)

that the land is currently located in California, a factor which was deemed controlling in Aranson. See App. at 148a. Second, the Arizona-California Compact, contrary to the one construed in the Nebraska case, only requires application of the law of the ceding state where failure to do so would prejudice the rights of persons claiming title to the ceded lands. See Petition at 29-30. Thus, a presumption is created favoring application of California law since that is the state where the land is now located. See Aranson, App. at 148a-149a. Third, the effect of this compact (as well as the one construed in the Nebraska case) is

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adequately addressed in Wilson. See 442 U.S. at 673-74.

to insure that titles good in the ceding state are not invalidated by virtue of the cession. Here, Petitioners have title to California land which is valid under California law, thus negating any application of the compact provision. And finally, having ceded the land at issue to California in 1966, Arizona simply has no interst justifying the extra-territorial application of its laws. Respondent argues that Petitioners should not be heard to object to application of Arizona law insofar as the original patent was issued there. Petitioners, however, have been within the jurisdiction of California since no later than 1966 and have every right to demand the protection of its laws.

The California law of accretion clearly recognizes an exception to the general rule where the accretion is artificially caused. That law, set forth in Cal. Civil Code § 1014, and has been construed in numerous state appellate cases, see, e.g., State v. Superior Court, 29 Cal.3d 240, 248, 172 Cal. Rptr. 713, 718, 625 P.2d 256, 261, cert. denied, 50 U.S.L.W. 3248 (1981); City of Long Beach v. Mansell, 3 Cal.3d 462, 469, 91 Cal. Rptr. 23, 28, 476 P.2d 423, 428 (1970); City of Los Angeles v. Anderson, 206 Cal. 662, 667, 275 P. 789, 791 (1929), by the court below, 661 F.2d at 770, and by this Court in State Lands Commission, 50 U.S.L.W. at 4673.

IV. THE COURT OF APPEALS INAPPROPRIATELY AND IMPROPERLY CONSTRUED ARIZONA LAW AS NOT DISTINGUISHING BETWEEN NATURAL AND ARTIFICIAL ACCRETIONS.

The Ninth Circuit held that the district court had committed no reversible error in applying the federal law of accretion, because it concluded that Arizona law was the appropriate rule of decision and that law paralleled the federal common law rule. 8/ 661 F.2d at 770-771. That decision was erroneous insofar as it misconstrued the significance of the Arizona Supreme Court decision in State v. Bonelli Cattle Co., 107

8/ Because the district court had refused to reconsider its decision after the Supreme Court overruled Bonelli, the principal issue on appeal was whether state or federal law applied. The actual content of Arizona law of accretion was only briefly addressed by the parties.

Ariz. 465, 469, 489 P.2d 699 (1971), holding that the general rule that accretions inure to the benefit of the upland owner, is not applicable where such accretions are artificially caused. See also Bonelli Cattle Co. v. Arizona, 414 U.S. at 328. 9/

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9/ As noted in the Petition, the Ninth Circuit relied on two other cases, both of which pre-dated Bonelli, and neither of which involved artificial accretion. Petition at 35-36.

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REPLY BRIEF

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No. 81-2250

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

Iva May Harvey, et al.,

Petitioners,

v.

United States of America,

Respondent.

REPLY BRIEF

The Government advances six arguments in support of its contention that review is not warranted. Each will be discussed seriatim.

1. It urges this case "is governed by federal law" because it "concerns title to lands that have become attached to lands which have been in federal ownership ever since they became part of this Nation." Brief for the United States in Opposition ("Govt. Brief"), pg. 9 (emphasis added).

This, of course, does not meet the test articulated in Wilson v. Omaha Indian Tribe, 442 U.S. 653, 670 (1979). To date federal property law has only been applied to ocean-front land, California ex rel. State Lands Commission v. United States, ___ U.S. ___, 102 S.Ct. 2432, 2438 (1982), and Hughes v. Washington, 389 U.S. 290, 293 (1967), and to land in which "the Government has never parted with title and its interest in the property continues. . . ." Wilson v. Omaha Indian Tribe, supra at 652.

To be sure, this Court may in the future decide to apply federal law in other situations where there is "an overriding federal interest", id. at 669, or where there is "some other principle of federal law requiring state law to be displaced", Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363, 371 (1977), but clearly this is not such a case. Hence, federal law does not govern the resolution

of this controversy. Ownership must therefore be determined under California law. Arkansas v. Tennessee, 246 U.S. 158, 175 (1918); see Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., supra at 362, and Joy v. St. Louis, 201 U.S. 332, 343 (1906).

2. The Government also argues that if State law must be used "Arizona law, rather than California law, should be borrowed as the applicable federal rule" of decision. Govt. Brief, pg. 11. This argument is based upon Nebraska v. Iowa, 406 U.S. 117 (1972), and Wilson v. Omana Indian Tribe, supra, where Nebraska law was applied to land ceded by that State to Iowa. But Nebraska law was followed to prevent Iowa and the Tribe from invoking legal principles which, if followed, would have defeated the otherwise valid claims of the pre-compact owners. Wilson v. Omaha Indian Tribe, supra at 676 - 78. But, as discussed below, there is no

difference between the California and Arizona doctrines of accretion. 1/ There is therefore no cogent reason for adopting Arizona law as the federal rule of decision. 2/

Moreover, the compact between Nebraska and Iowa is substantially different from the Arizona - California compact. See Petition for Writ of Certiorari [etc.], pp. 29 - 30. Under the agreement between Arizona and California the law of the ceding State is not to be applied except in those rare instances where failure to do so would "preju-

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1/ Arizona apparently does allow a presumption of accretion (see State v. Bonelli Cattle Co., 107 Ariz. 465, 489 P.2d 699, 702 (1971)), but the effect of that presumption would disappear with the evidence of avulsion adduced by Petitioners at trial. More importantly, it would not affect the parties' proof of what caused the accretion, the issue before this Court.

2/ Indeed, much like Tyson v. State of Iowa, 283 F.2d 802, 811 (8th Cir. 1960), quoted with approval in Nebraska v. Iowa, supra at 126: "Iowa law controls since all of the land in controversy is located in Iowa, and . . . the Nebraska law of accretion did not operate to create riparian

dice the titles, rights or claims of any person . . . to any of the lands" ceded. 1963 Ariz. Sess. Laws, ch. 77, §5; 1963 Calif. Stat., ch. 859, §4. Here no claim of prejudice has, or can, be made.

Finally, one of the express purposes of the Arizona - California compact was to eliminate confusion and difficulty in "the enforcement and administration of the law of the two states and of the United States." Pub. Law 89-531, Art. I, 80 Stat. 340 (1966). But applying Arizona law would certainly add to, rather than eliminate, the confusion and difficulty of such concern when the compact was ratified.

3. The Government's third contention is based upon the alleged "absence of any controlling [Arizona] state court decision" and a presumption that Arizona therefore

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(continued)

rights within the territorial limits of Iowa."

follows the general common law rule by disregarding the cause of accretion. Govt. Brief, pg. 12. This "absence" and presumption are squarely at odds with the one Arizona Supreme Court case that has addressed this issue, State v. Bonelli Cattle Co., supra at 469, 489 P.2d at 703. There it was held that "[w]here a river shifts to a new location as a result of unnatural forces" no change in title ensues. Id. Indeed, the Government's argument is patterned largely after the dissent in that case, a position which the majority of the Arizona Supreme Court must therefore have considered and rejected. Id. at 470, 489 P.2d at 703 - 04.

Furthermore, the majority opinion did not, as the Government suggests, dispose of that dispute solely on the ground "that the channel had been uncovered "rapidly and perceptibly.'" Govt. Brief, pg. 12. Rather, the court concluded:

> "The plaintiff argues what it calls the 'artificial accretion' theory, urging that an abut-

> ting owner is entitled to the accretion caused by artificial conditions over which he has no control. An accretion is a 'gradual and imperceptible accumulation of land by natural causes,' Black's Law Dictionary. In the instant case, the exposed portion of the channel was not brought into existence gradually and imperceptibly. The exposure was man-made and the channel was uncovered rapidly and perceptibly." Id. at 468, 489 P.2d at 703.

After reconsideration of this decision the Arizona Supreme Court stated that "artificial control of the river could not deprive Arizona of property rights in the bed which were constitutionally vested prior to" the man-made changes in the river channel. 108 Ariz. 258, 260, 495 P.2d 1312, 1314 (1972).

4. Clearly, then, the Government misconstrues the law of accretion in Arizona. But it does much more than misconstrue the law of California in representing that "the California courts follow the usual common law rules in disputes concerning lands along

non-tidal rivers and streams." Govt. Brief, pg. 14. Indeed, though the Government elsewhere cites and relies on California ex rel. State Lands Commission v. United States, supra, it fails to mention that there this Court recognized the importance of causation under the California law of accretion. ___ U.S. at ___, 102 S.Ct. at 2435. Suffice it to say, there are several California appellate decisions which state very clearly that an upland owner will not benefit by accretions caused by artificial or unnatural causes. State v. Superior Court of Placer County, 29 Cal.3d 240, 248, 625 P.2d 256, 261, 172 Cal. Rptr. 713, 718 (1981), City of Long Beach v. Mansell, 3 Cal.3d 462, 469, 476 P.2d 423, 428, 91 Cal. Rptr. 23, 28 (1970), and City of Los Angeles v. Anderson, 206 Cal. 662, 667, 275 P. 789, 791 (1929).

5. Nor will the Government's assertion that "there is good reason to believe" the Submerged Lands Act of 1953 compels ap-

plication of federal law withstand scrutiny. Govt. Brief, pg. 15. California ex rel. State Lands Commission v. United States, supra, held that Section 5(a) of that Act precluded adopting a State standard only after finding that federal law governed. Obviously when, as here, State law governs in the first instance the Court is not free to select a rule of decision and must apply the State's law. Arkansas v. Tennessee, supra at 175. Thus, in Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., supra, this Court rejected the contention that the Submerged Lands Act was a "basis for a colorable claim of federal right" and stated that:

> "[T]he Submerged Lands Act did not alter the scope or effect of the equal-footing doctrine, nor did it alter state property law regarding riparian ownership. The effect of the Act was merely to confirm the States' title to the beds of navigable waters within their boundries as against any claim of the United States Government. As merely a declaration

> of the States pre-existing rights in riverbeds, nothing in the Act in any way mandates, or even indicates, that federal common law should be used to resolve ownership of lands which, by the very terms of the Act, reside in the States." 429 U.S. at 371 - 72, n. 4.

Moreover, the provision relied upon by the Government reserves to the United States only land, "together with all accretions thereto," that it "lawfully and expressly" acquires from a State or person. 43 U.S.C. §1313(a). Here the disputed parcel is accretion to land never owned by a State or private person. See Govt. Brief, pg. 9. A fortiori, the Government did not expressly acquire this tract from a State or person.

The next clause deals expressly with the Government's upland, to which Harvey's Fishing Hole attached, and it makes no mention of accretion. That clause reserves to the United States "all lands expressly retained by or ceded to the United States when

the State entered the Union. . . ." Id. There is absolutely no dispute that title to the upland in this case was "retained" by the United States. Govt. Brief, pg. 2. Accordingly, accretion to this retained land is not subject to the federal law exception noted by this Court in California ex rel. State Lands Commission v. United States, supra.

6. The Government's final argument relates to the estoppel issue. It contends, as it did in the court of appeals, that the juries' answers to Special Interrogatories Nos. 6 and 7 were supported by substantial evidence and therefore must not be disturbed. Govt. Brief, pg. 16. Those answers were to the effect that Petitioners were not ignorant of the Government's claim to this land and did not detrimentally rely on the Government's conduct. Petitioners vehemently disagree but unfortunately cannot, at this juncture, present a detailed analysis of the evidence which supports their position.

See Petition for Writ of Certiorari [etc.], pp. 58 - 62. Such an analysis will be made if they are permitted to brief this case, however.

Suffice it to say that the juries' answers are patently illogical. The following demonstrates why. When the Harveys purchased this parcel in 1952 they received clear and marketable title. It was not until the late 1950's that the Government expert who first suspected this was accretion land formed that opinion. But he never told any of the Petitioners (though he had many opportunities to do so). Not until 1960 was this suspicion confirmed by survey, but by then the Harveys had cleared, subdivided and commenced selling lots in the subdivision. The Government intentionally delayed notifying Petitioners of its claim until 1967. In the meantime, and with the actual knowledge of the same Government expert and of the Government employees responsible for administering federal land in this area, most of

the 96 lots were sold, some were resold, and many homes and other valuable improvements were constructed.

The only logical inferences to be drawn from these facts are that Petitioners were indeed ignorant of the Government's claim and did in fact rely upon its conduct to their detriment. 3/ The jury findings to the contrary are not supported by substantial evidence and must be set aside.

In conclusion, none of the arguments advanced by the Government support its assertion that review is unwarranted. For the reasons set forth in the Petition, there is a compelling need for issuance of a writ of certiorari, now the last remedy available for the prevention of a grave miscarriage of justice.

3/ The Government, like the jury, must believe that Petitioners were incredibly naive. Otherwise they certainly would not have purchased and improved this land knowing it was owned by the United States. 196 occupants were named as defendants and it defies logic that all were that naive.

Respectfully submitted.

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August 27, 1982

CERTIFICATE OF SERVICE

I, Floyd H. Shebley, one of the attorneys for Petitioners and a member of the Bar of this Court, certify that on the 27th of August, 1982, the foregoing Reply Brief was duly served upon all of the other parties hereto by depositing a true and complete copy thereof in a United States post office in Portland, Oregon, with first class postage fully prepaid, addressed as follows:

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